1 Battersea Bridge Road

London Borough of Wandsworth
Local Plan Examination: Matter 13 Hearing Statement

27 October 2022

1. Introduction

1.1 Savills (UK) Ltd ('Savills') has been instructed by Promontoria Hurlingham Ltd ('PBL') to prepare this statement and participate in the forthcoming examination of the London Borough of Wandsworth ('LBW') draft Local Plan 2023-2038 ('The Draft Plan').

1.2 PBL exchanged contracts to purchase 1 Battersea Bridge Road ('the Site) in 2021, an unallocated site within the Ransomes Dock Area of Focal Activity with the aim of redeveloping the Site. As the Site is an under-utilised office building that is not for modern occupiers, in a highly sustainable brownfield site in a well-located location, it presents an excellent opportunity to help LBW deliver a number of policy ambitions, in particular making a significant contribution towards its housing need.

1.3 We understand that the Inspectors are not assessing the merits of omission sites as part of this Examination process. As such, reference made to the Site in this hearing statement seeks to demonstrate the deficiencies of the Draft Plan's evidence base, concluding that the Draft Plan is not sound.

1.4 This statement proposes two modifications to the wording of Policy LP4 to ensure the policy is justified, effective and consistent with national policy. This statement responds to Matter 13 – Achieving High Quality Places (Policy LP1 – LP9) which poses the questions:

- ***'Are the requirements of the Achieving High Quality Places policies justified by appropriate available evidence, having regard to national guidance, local context and the London Plan?'***
- ***'Policy LP4 (Tall Buildings) – Is the policy consistent with Policy D9 of the London Plan?'***
- ***'Do Policies LP1-LP9 provide clear direction as to how a decision maker should react to a development proposal?'***

2. Planning Policy Context

2.1 London Plan Policy D3 encourages all development to make the best use of land by following the design-led approach that optimises site capacity. It also states that higher-density developments should generally be promoted in locations well connected to jobs, services, amenities and infrastructure.

2.2 London Plan Policy D9 establishes a framework for the appropriateness of tall buildings to be assessed against, such as functional, visual, environmental and cumulative impacts (Policy D9 Part C). Policy D9 establishes through the development management system, different design solutions to be appropriately tested without defining prescriptive outcomes at the plan-making stage.

3. Main Representation

Are the requirements of the Achieving High Quality Places policies justified by appropriate available evidence, having regard to national guidance, local context and the London Plan?

3.1 The London Plan Policy D3/D9 approach requires consideration of multiple design options to determine the appropriate form of development based on a site's context and capacity for growth, in addition to existing and planned infrastructure capacity. Ultimately, the policies as set out, allow for the development management process to determine the most appropriate form of development for individual sites.

3.2 Draft Policy LP4 establishes tall and mid-rise building zones across the borough; with 'tall' buildings defined as 7-storeys or 21m (whichever is the lower) and 'mid-rise' (for 1 Battersea Bridge Road) defined as 6-storeys or 18m (whichever is the lower). This approach was formulated by LBW between the Reg.18 & Reg.19 versions of this plan. We consider this rigid approach to mid-rise and tall buildings to be inflexible and an inappropriate strategy for the borough to be able to encourage and deliver appropriately optimised sites. We also consider the classification of sites between these zones to be arbitrary and lacking a coherent and justifiable evidence base.

3.3 The Draft Plan proposes that 1 Battersea Bridge Road is classified within a mid-rise building zone and draft Policy LP4 would cap any re-development of this site at 6 storeys or (18m). As part of our Regulation 19 submission to LBW[1], we demonstrated that a cap of these heights would have the effect of sterilising the site, meaning it would not be able to contribute to any objectives of the draft plan. Notwithstanding this matter of sterilisation, it is also our view that the classification of the Site in a mid-rise zone is not based on proportionate evidence and is not therefore **justified**.

3.4 In the current adopted LBW Local Plan, the Site is located within the Ransomes Dock Focal Point of Activity. DMD Policy DMS4 establishes that 9+ storeys buildings in this location should be assessed as 'tall buildings'. The evidence base for this version of the Local Plan and its heights policy was informed by Arup's Urban Design Study (2011) ('UDS 2011') which states in Paragraph 2.96 that '*along the riverside, prevailing buildings indicate that a building of 9 storeys and above will be tall and therefore subject to the tall buildings policy…'.*

3.5 As such, it is evident that both LBW and Arup have previously considered the site to be capable of accommodating a building up to 8 storeys before the tall building policy requirements are triggered. Furthermore, the policy framework, as drafted, allows for heights greater than 9 storeys, which would normally be determined through Development Management procedures.

3.6 In addition to the adopted policy position, this Site was subject to pre-application advice from the Council in November 2018 (Appendix 1).

3.7 This advice from the Borough states on Page 5 that, "*A tall building in this location next to Battersea Bridge - a gateway to the borough - would act as a landmark and reference point. This location is therefore considered appropriate for a tall building"*. This further reiterates that officers of the Council considered the Site, in principle, capable of accommodating a tall building.

3.8 The LBW undertook its Regulation 18 consultation of the draft plan (Reg.18 Plan) in early 2021. At Reg.18 consultation stage, the Site was located within an opportunity area for tall buildings and/or landmark buildings, which was underpinned by Arup's Urban Design Study (2020) ('UDS 2020'). In carrying out design and character analysis of the Wandsworth Riverside area, the UDS 2020

[1] https://www.wandsworth.gov.uk/media/11188/107_promontoria_battersea_limited_savills_redacted.pdf

was clear that the area '*has a medium sensitivity to change with potential for targeted growth,'* and that '*new development should have distinctive character that creates remarkable landmarks.'*[2]

3.9 In the submission version of the Draft Plan, the Site (in isolation) has been removed from the area earmarked for tall and/or landmark buildings and the Site placed within a midrise building zone. Following a review of Arup's Urban Design Study (2021) ('UDS 2021'), there is no justification for LBW's approach in removing the Site from the tall building zone. Appendix A of the UDS 2021 provides high level townscape, visual and heritage assessment for various tall building zones, which includes detailed massing models for many of the tall building areas to assist in justifying an area's respective designation. However, the Site is located within mid-rise building zone MB-B2-02, which has no such townscape, visual and heritage assessment. It is therefore unclear what evidence LBW has utilised to justify a deliberate reallocation of this site, particularly where no other neighbouring plot has been reallocated to a midrise zone. The lack of evidence to underpin the above makes draft Policy LP4 **not justified**.

3.10 LBW's response to PBL's Regulation 19 written representation states

> 'T*he height parameters have been set using the evidence of the Urban Design Study (UDS)…The height parameters are based on a characterisation process which is informed by industry guidance set out by the Landscape Institute, Natural England and the Greater London Authority.'*

3.11 This is an insufficient rebuttal given the UDS 2021 does not provide specific direction as to how those documents influenced the characterisations or conclusions made. Notwithstanding, the UDS 2021 assesses an areas capacity for tall buildings by assessing the character area's sensitivity to change and probability of change. Effectively, the lower the area's sensitivity to change and the higher the probability of change, the more appropriate the area may be for tall buildings. The Site is located in a 'lower' sensitivity area and a 'lower/medium' probability to change. Furthermore, page 11 of the UDS 2021 states that the strategy for tall buildings focusses on areas such as the River Thames frontage, in which the Site is located. The above demonstrates that the area the Site should be re-designated into a tall buildings area. In light of this, we consider Draft Plan Policy LP4 to be **not justified**.

3.12 Turning to the positive case of a tall building, the Site presents a demonstrable opportunity at the bridgehead of Battersea Bridge to deliver a visually coherent and legible scheme that acts as a distinct marker of entry into LBW. In this context we consider the Site capable of accommodating a building taller than mid-rise in this location. This is echoed in the Townscape Narrative (Appendix 2 below) which outlines that a tall building can be justified at the bridgehead of Battersea Bridge.[3]

'Policy LP4 (Tall Buildings) – Is the policy consistent with Policy D9 of the London Plan?'

3.13 London Plan Policy D9 (Part A) states that *'Development Plans should define what is considered a tall building for specific localities…but should not be less than 6 storeys or 18 metres…'*

3.14 Part B(2) of Policy D9 then goes on to add that '*Any such locations and appropriate tall building heights should be identified on maps in Development Plans'*. However, Policy D9 does not go on to cap heights or limit development heights. Rather, it allows for a development plan to cite what may be 'appropriate' but allows flexibility for a judgement to be made by the decision maker, with regards to what an acceptable height of a development may be, having due regard to the tests set out in Part C of the policy.

[2] Arup Urban Design Study (2020) page 71

[3] Paragraph 2.21 of the Townscape Narrative

3.15 Draft Policy LP4 (Part D) goes beyond the requirements of Policy D9 by stating that *'proposals for tall buildings should not exceed the appropriate height range identified for each of the tall building zones*'. We consider this drafting to be both unduly restrictive and not in **general conformity** with the London Plan.

3.16 London Plan Policy D9 (Part B (3)) states *'Tall buildings should only be developed in locations that are identified as suitable in Development Plans.'* Draft Policy LP4 (Part C) states proposals for tall buildings will not be permitted outside of the identified tall building zones. We note that Policy D9 uses the word 'should', compared to Draft Policy LP4 (Part B) where it is stated that proposals 'will only be appropriate in tall building zones.' We therefore consider this policy is **not in general conformity** with the London Plan and is **not effective**.

3.17 Further, the blanket prohibition of tall buildings outside of identified zones as per Draft Policy LP4 (Part D) does not align with the *Master Brewer (2021)* judgment of the High Court. The High Court held that a tall building proposal should be assessed against the potential impacts outlined in London Plan Policy D9 (Part C), as opposed to assessing the impacts in a vacuum. Draft Policy LP4 currently restricts tall buildings outside of tall building zones irrespective of the wider regenerative benefits (such as housing deliver) a building of scale is capable of delivering.

3.18 Judicial interpretation of Policy D9 is as follows:

> *'In considering whether to grant planning permission for a tall building which did not comply with paragraph B(3), because it was not identified in the development plan, it would surely be sensible, and in accordance with the objectives of Policy D9, for the proposal to be assessed by reference to the potential impacts which are listed in Part C. The Claimant's interpretation leads to the absurd result that a decision-maker in those circumstances is not permitted to have regard to Part C, and must assess the impacts of the proposal in a vacuum[4]'*

3.19 However, in interpreting the *Master Brewer* judgment (Appendix 3) LBW noted in its response to PBL's Regulation 19 representation that *'the Council considers that the Master Brewer judicial review Case should be interpreted in those circumstances specific to the London Borough of Hillingdon…*' *The Master Brewer judgment was considering the meaning of policies in the London Plan. That is, of course, part of the statutory development plan for Wandsworth. While the case itself concerned Hillingdon the proper meaning of policy D9 in the London Plan cannot be different between the London Boroughs. This goes to the point made by Lord Reed in Tesco Stores Ltd v Dundee CC [2012] UKSC 13, [2012] PTSR 983* (Appendix 4) that *"planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean" (see para 19).* The Courts are the arbiters of the proper interpretation of planning policy. So, the London Plan cannot be interpreted to have a different meaning in one borough as compared to the next. That is different from the question of the application of these policies. That is, as the Court indicated in *Hopkins Homes Ltd v SSCLG [2017] UKSC 37, [2017] 1 WLR 1865 at para. 25* (Appendix 5) *"the primary responsibility of planning inspectors."* In this vein, we consider LBW's interpretation of Policy D9 to be incorrect, which in turn, renders Draft Policy LP4 (Part D) overly restrictive, **not effective** and **not in general conformity** with the London Plan.

[4] Paragraph 85 of *Master Brewer* (2021) judgment

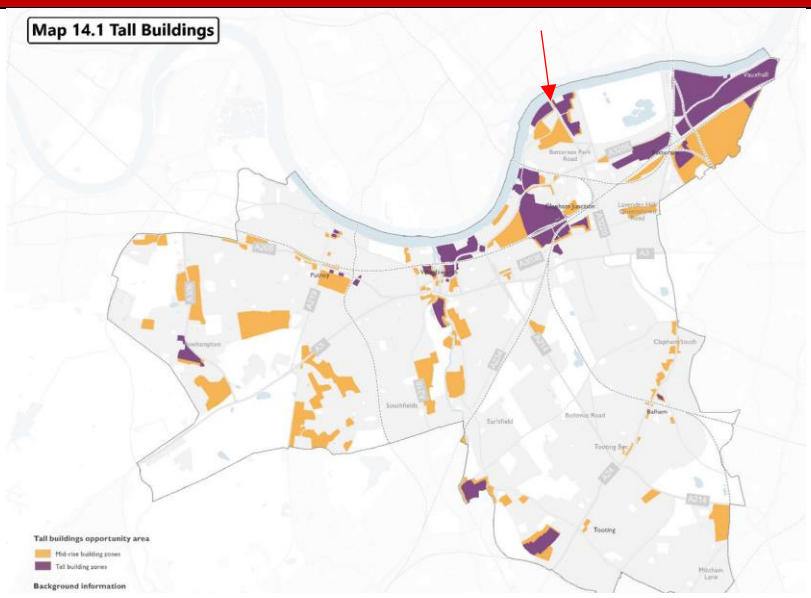
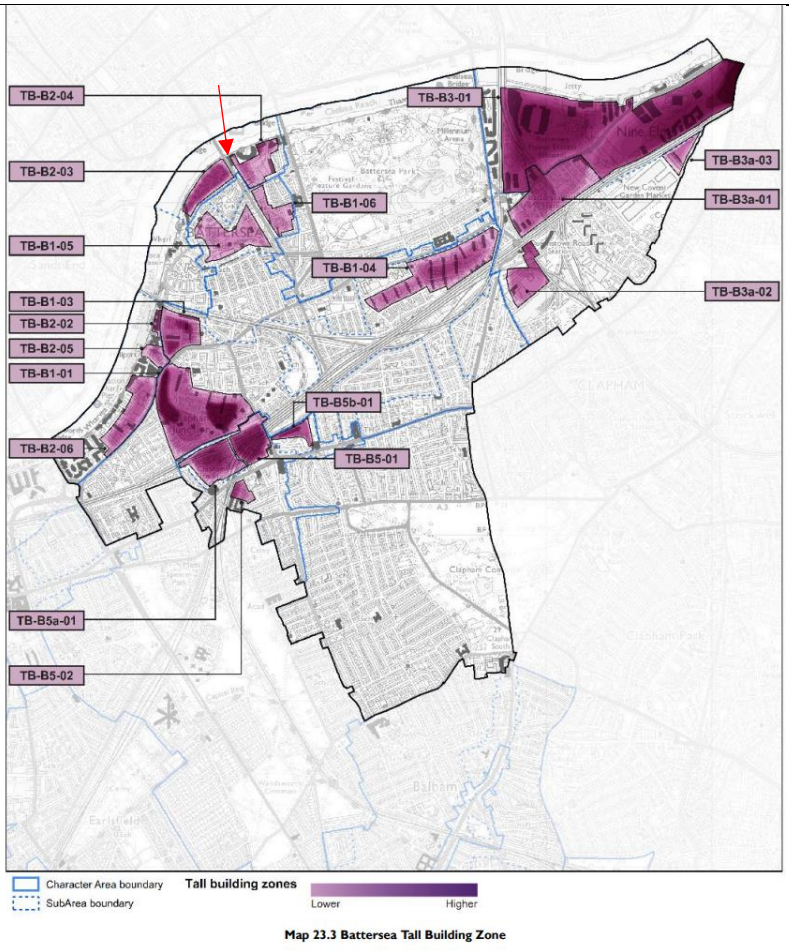
Proposed Modifications

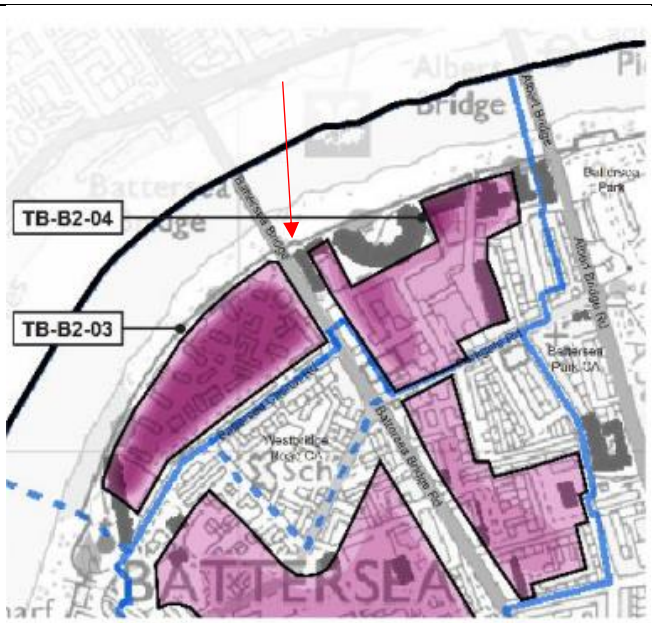
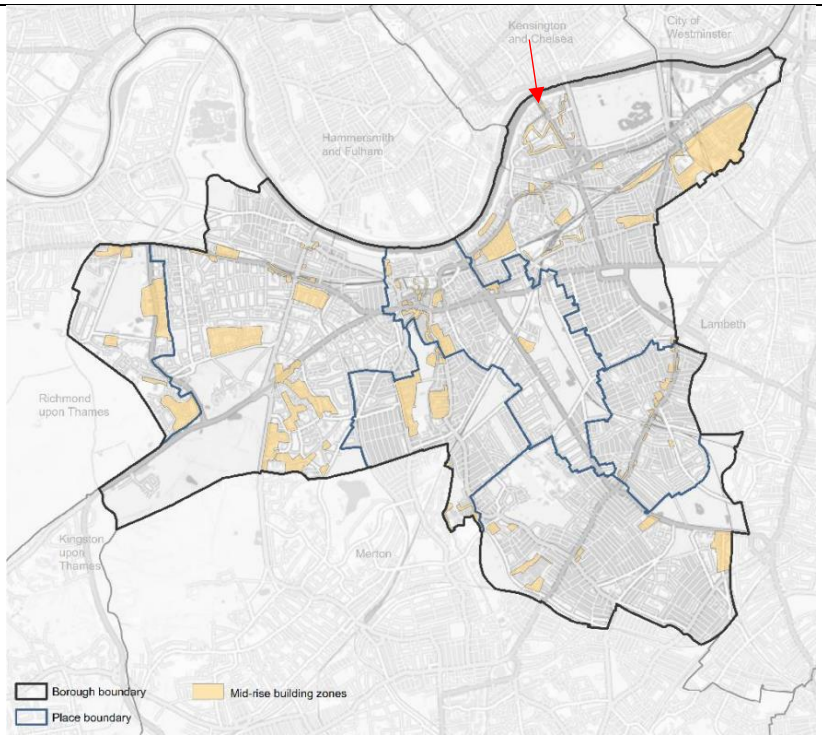
3.20 As set out above, we do not consider Draft Policy LP4 to be sound, nor do we consider the classification of 1 Battersea Bridge Road in a mid-rise zone to be justified. As such, we respectively request that the Inspectors consider the amendments suggested below in order to declare the plan sound.

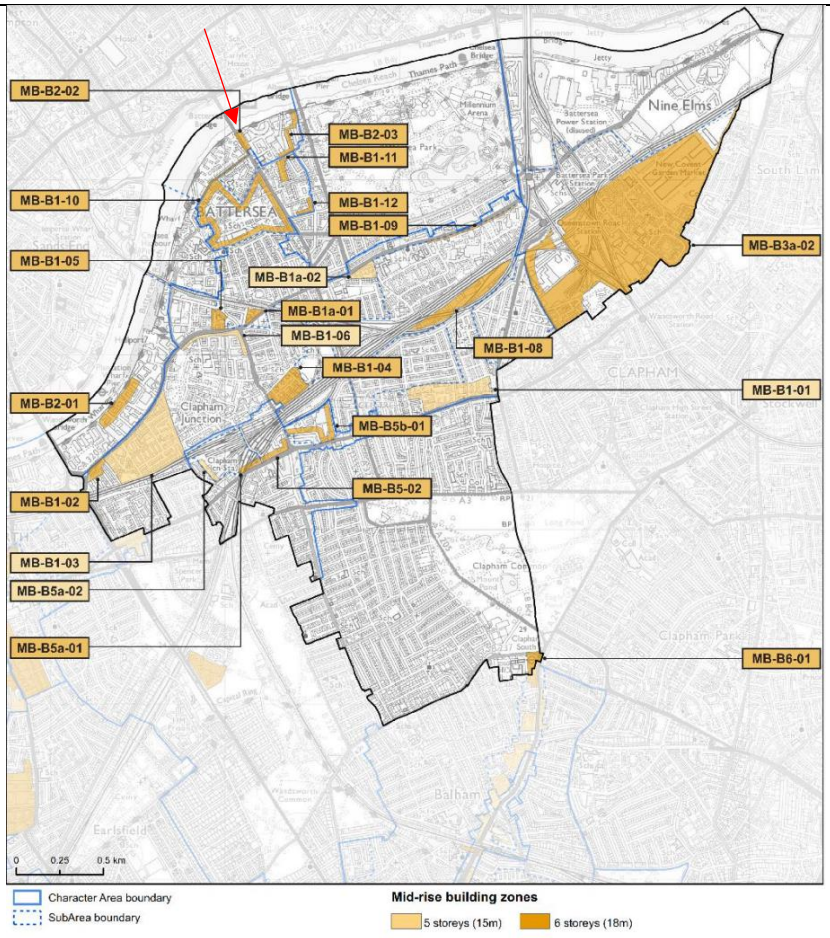
Table 1. Proposed Policy Wording Amendments

Draft Policy	Draft Wording	Proposed Wording
LP4 (B)	Proposals for tall buildings will only be appropriate in tall building zones identified on tall building maps included at Appendix 2 to this Plan, where the development would not result in any adverse visual, functional, environmental and cumulative impacts. Planning applications for tall buildings will be assessed against the criteria set out in Parts C and D of the London Plan Policy D9 and those set out below as follows:	Tall buildings should be developed in tall building zones ~~Proposals for tall buildings will only be appropriate in tall building zones~~ identified on tall building maps included at Appendix 2 to this Plan, or where the development would not result in any adverse visual, functional, environmental and cumulative impacts. Planning applications for tall buildings will be assessed against the criteria set out in Parts C and D of the London Plan Policy D9 and those set out below as follows:
LP4 (C)	Proposals for tall buildings will not be permitted outside the identified tall building zones	Proposals for tall buildings will not be permitted outside the identified tall building zones except where they would not result in any adverse visual, functional, environmental and cumulative impacts in accordance with London Plan policy D9(c).
LP4 (D)	Proposals for tall buildings should not exceed the appropriate height range identified for each of the tall building zones as set out at Appendix 2 to this Plan. The height of tall buildings will be required to step down towards the edges of the zone as indicated on the relevant tall building map unless it can be clearly demonstrated that this would not result in any adverse impacts including on the character and appearance of the local area	~~Proposals for tall buildings should not exceed the appropriate height range identified for each of the tall building zones as set out at Appendix 2 to this Plan.~~ Proposals for tall buildings may exceed the height of the relevant definition established in Appendix 2 where they would not result in any adverse visual, functional, environmental and cumulative impacts in accordance with London Plan policy D9(c). The height of tall buildings will be required to step down towards the edges of the zone as indicated on the relevant tall building map unless it can be clearly demonstrated that this would not result in any adverse impacts including on the character and appearance of the local area.

Table 2. Proposed Policy Map Amendments

Map Reference	Draft Map	Proposed Changes
14.1		Site currently shaded in orange. Site to be removed from the orange area (midrise building zone) and be coloured purple (tall building zone).
23.3	 Map 23.3 Battersea Tall Building Zone	The Site is currently not shaded. The map should be amended to include the Site shaded in dark purple.

23.10		The Site is currently not shaded. The map should be amended to include the Site shaded in dark purple.
23.29		The site is currently within an orange shaded area. The site should be removed from this map.

23.31		The site is currently within an orange shaded area. The site should be removed from this map

4. Conclusions

4.1 This statement sought to answer the three questions raised by Inspectors in Matter 13. These questions are:

1. *'Are the requirements of the Achieving High Quality Places policies justified by appropriate available evidence, having regard to national guidance, local context and the London Plan?'*

A: For reasons outlined throughout this statement, we consider that the requirements of Achieving High Quality Places are not justified by appropriate evidence, having regard to national guidance, local context and the London Plan.

2. *'Policy LP4 (Tall Buildings) – Is the policy consistent with Policy D9 of the London Plan?'*

A: For reasons outlined in paragraphs 3.1-3.19 of this statement, Draft Policy LP4 is not consistent with Policy D9 of the London Plan.

3. *'Do Policies LP1-LP9 provide clear direction as to how a decision maker should react to a development proposal?'*

A: It is our view that Draft Policy LP4 does not provide clear direction as to how a decision maker (LBW) should react to a development proposal. We consider that our proposed modifications as per Table 1 and Table 2 will provide clarity.

Appendix 1. LBW Pre-Application Response (2018)

Wandsworth Council
Environment and Community Services Department
The Town Hall
Wandsworth High Street
London SW18 2PU

Please ask for/reply to: Thomas Wilson
Telephone: 020 8871 6000
Direct Line: 020 8871 7646
Email: twilson@wandsworth.gov.uk
Web: www.wandsworth.gov.uk

Our ref: WD\2018\ENQ\00812
Date: 09/11/2018

David Shiels
DP9 Ltd on behalf of Lockguard Ltd
100 Pall Mall
London
SW1Y 5NQ

Dear Mr Shiels,

PRE-APPLICATION ADVICE – The Glassmill 1 Battersea Bridge Road SW11 3BZ
Thank you for your pre-application request received on 25th September 2018. In accordance with the below policies and guidance this letter will advise you on the acceptability of the works you propose to carry out at the above property in order to aid the submission of any future planning application. The advice has been based on the drawings received and the meeting held at the Council's offices.

Site:
The Glassmill is a part five-storey, part six-storey building located on the east side of Battersea Bridge Road. The building was built in the 1980's and its glazed curtain wall façade is typical of that era.

The main access to the building is provided from a stepped entrance on Battersea Bridge Road. There is a basement level car park that is accessed from a private road to the rear that connects with Hester Road.

The site is bound to the north by the River Thames and to the rear by Hester Road and the Royal College of Art. A five-storey residential building is situated to the immediate east, with the nine-storey Albion Riverside Building situated beyond.

The property is not listed, nor is it located within a Conservation Area, although it is located adjacent to Battersea Bridge which is a Grade II Listed Building.

Relevant planning history:
Bridge House Wharf, Battersea Bridge Road/Hester Road
1981 (81/N/2441): p.p. for erection of mixed development comprising 3810sq.m offices and 17 flats.

The Glassmill
1995 (95/N/0477): p.p. for use of part of fifth floor as a dental surgery (Class D1).
2004 (2004/3608): appeal allowed for installation of telecommunications equipment on the roof of the building, comprising six panel antennae, four dish antennae, and an equipment cabinet.
2007 (2007/0722): p.p. for alterations to entrance on Battersea Bridge Road frontage replacing revolving doors with swing doors, and construction of access ramp.

2014 (2014/4843): p.p. for replacement of four existing plant units to the roof with six new units and associated acoustic screen.
2018 (2018/1212): Approved determination as to whether prior approval is required for change of use from offices on first, second, third, fourth and fifth floors (Class B1(a)) to residential (Class C3) to provide 13 x 1-bedroom, 14 x 2-bedroom, 1 x 3-bedroom and 1 x 4-bedroom flats with associated basement bin/cycle storage and 23 parking spaces.
2018 (2018/1311): Approved determination as to whether prior approval is required for change of use from offices on first, second, third and fourth floors (Class B1(a)) to residential (Class C3) to provide 13 x 1-bedroom, 14 x 2-bedroom and 1 x 3-bedroom flats with associated basement bin/cycle storage and 23 parking spaces.

Albion Wharf Hester Road SW11 – Now No. 6 Hester Road
Erection of a six-storey building to provide 585 sq.m. of retail floorspace on the ground floor, and 45 residential flats (affordable housing units) on the upper floors.

Constraints:
Flood Zone 2: Medium flood risk zone
Flood Zone 3a: High flood risk zone - 1 in 100 or greater probability of flooding each year
Wandsworth Thames Policy Area
Ransome's Dock Focal Point of Activity
Archaeological Priority Area

Proposal:
The pre-application enquiry is for the following:

- Erection of 26-storey building (north block) fronting the River Thames and Battersea Bridge Road and 8-storey building (south block) fronting Hester Road and Battersea Bridge Road with a potential 6-storey addition. There are two design options for the north block that incorporate different recesses to the lower storeys (tiered or a consistent stagger).
- The two blocks would be above a podium that due to the change in levels would appear as a single-storey fronting the river and two-storeys fronting Hester Road.
- Lower ground floor level to comprise plant and car park with a commercial unit fronting Hester Road
- Ground level podium and the remaining 7-storeys within the south block would be in commercial use totalling a GIA of 3,500sq.m, 4,140sq.m when including the additional 6-storey element.
- The north block above podium level would be in residential use comprising 115 residential units of which 40 (35%) would be affordable.
- The main entrances would be off Battersea Bridge Road. Access to the car park would be at the rear via the existing service road.
- Public realm improvements to the riverfront and Battersea Bridge Road.

Planning policy:
National Planning Policy Framework (2018)
London Plan (2016) Draft 2017
Core Strategy (2016)
PL2 – Flood risk; PL6 – Meeting the needs of the local economy; PL9 – River Thames and the riverside; IS1 – Sustainable Development; IS2 – Sustainable design, low carbon development and renewable energy; IS3 – Good quality design and townscape; IS4 – Protecting and enhancing environmental quality; IS7 – Planning obligations

Development Management Policies Document (2016)
DMS1 – Sustainable urban design; DMS2 – Managing the historic environment; DMS3 – Sustainable design and low-carbon energy; DMS4 – Tall buildings; DMS5 – Flood risk management; DMS6 – Sustainable Drainage Systems; DMI3 – Thames Policy Area; DMI4 – Provision of flexible employment floorspace; DMH3 - Unit mix in new housing; DMH4 - Residential development including conversions; DMH6 - Residential space standards; DMH7 - Residential gardens and amenity space; DMH8 - Implementation of affordable housing; DMTS14 Offices; DMO5 – Trees; DMO8 – Focal points of activity; DMT1 – Transportation impacts; DMT2 – Parking and Servicing;

Planning Obligations SPD (2015)
Refuse and Recyclables in Development SPD (2014)
Housing SPD (2016)
Employment and Industry Document (EID) (proposed submission version March 2017)

Comments:
The main material planning considerations to the proposal are listed below:

- Principle of development;
- Housing Mix
- Design and Layout
- Neighbours' amenity;
- Future Occupants
- Highways, transportation and waste;
- Waste and Refuse
- Flood risk and Sustainable urban drainage systems (SUDS);
- Environmental health (noise, air quality and contaminated land);
- Sustainability;
- Archaeology;
- Impacts on the heliport;
- Planning obligations.

Principle of the proposed land use
Spatial strategy

The site is within the Ransome's Dock Focal Point and Thames Policy Area where mixed use development with appropriate Town Centre uses will be encouraged.

The site is identified in the wider Area Spatial Strategy for Ransome's Dock, although does not have a site specific allocation.

Within the Site Specific Allocations Document (2016) the site is part of the Ransomes Dock Area Spatial Strategy, the relevant considerations from this are:

- This area has been identified for a wider mixture of uses, including restaurants cafes, bars and small-scale retail uses and the provision of attractive public spaces with good access to them.
- There is scope to develop a vibrant riverside quarter with the dock as the focus of the area.
- Improved system of public routes through the area.
- Achieve a high quality of design and landscaping
- Create a safe environment which is accessible to people with disabilities

- The area is sensitive to tall buildings. Buildings that front the River Thames are considered tall at 9-storeys and above.

The SSAD acknowledges that redevelopment to include residential use is acceptable in principle, and policy DMI3 states that residential development will be appropriate in the Thames Policy Area as part of a mixed use development.

Both the adopted plan and the emerging EID protect offices for change of use in the Thames Policy Area (DMI3 adopted plan) and in Focal Points (EI2 of the EID), requiring there to be no net loss of office floorspace in redevelopments. The submitted plans show a re-provision of the existing office space, which would therefore meet this objective and enhance the overall acceptability of the proposal. Were the development not to meet this requirement the Council would take a view as to the weight they would afford the option to implement the prior approval to convert most of the existing building from offices to residential use.

Policy EI4 requires development of more than 1000sq.m of economic floorspace to either provide a proportion of office floorspace at affordable rent in perpetuity, or an element of managed workspace that minimise overhead and upfront investment costs.

Policy EI4 supports workspace for specialist sectors, notably cultural workspace. Within the locality there are already a number of innovative and creative businesses including the RCA (Royal College of Art), Vivienne Westwood Studios, Foster and Partners offices, commercial galleries and a photographic studio.

The nearby RCA currently runs a successful start-up business programme. Prospering businesses from this programme will inevitably need to expand and move-on to larger premises. The proposal offers an attractive opportunity to provide the next step for these businesses. You are encouraged to contact the RCA to explore the likely needs of these businesses and tailor the office space accordingly. Any new office floorspace should be high quality as set out in EI5.

Within Focal Points the amount of retail Class A1 space is limited to 300sq.m. This amount is likely to have already been reached given the presence of the Co-op on Battersea Bridge Road and Bayley & Sage on Parkgate Road. The provision of any A1 retail is therefore discouraged. A restaurant/café fronting the riverside (Class A3) would be acceptable and would help activate that part of the river walk. Battersea Bridge Road should have an active frontage or frontage demonstrating activity.

Design and Layout

<u>Mass and height</u>

The site lies within the area spatial strategy for Ransome's Dock. The trigger point for a tall building assessment is 9-storeys within the site, which the 26-storey north block would meet. The presence of a tall building would require the proposal to address the 15 criteria under policy DMS 4/4a, as justification for the height of the building in this area.

The existing building is a dated 1980's office block clad in reflective glass and with a significant amount of unattractive visual clutter at roof level. The building detracts from the setting of the listed bridge and the Battersea Bridge Road streetscene. The

proposal offers an opportunity to replace it with a building of much greater architectural quality.

During the pre-app discussions the massing of the building has evolved and shifted. It was generally agreed that the site should contain two blocks with a taller element fronting the river and a reduced height facing Hester Road and Battersea Bridge Road.

A tall building in this location next to Battersea Bridge - a gateway to the borough- would act as a landmark and reference point. This location is therefore considered appropriate for a tall building.

The proposed 26-storey height of the building is significant in the existing context, with the tallest building at 11-storeys (Albion Wharf). It is noted within the wider context there are taller buildings, notably the Montevetro Building and Chelsea Waterfront opposite.

The configuration of the site ensures that when viewed head-on the building would retain a slender profile. It is considered necessary to explore ‘sliming-down’ the taller building along the Battersea Bridge Road elevation so that it has a narrower profile. At present it is considered broad, which combined with the proposed height and given the prominent location and the surrounding roofscape context would result in massing which would accentuate the tall building.

The smaller south block is considered appropriate in scale and mass. The building would be reasonably wide so would need to be visually broken up through appropriate articulation.

Battersea Bridge is listed and therefore its setting is a consideration, given the close proximity of the proposal site.

Section 66 of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 states: "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

The setting of the listed bridge is currently diminished by the presence of the existing building. The proposed building, even with greater height than the existing, if well designed together with an enhanced public realm could improve the setting of the bridge. If the proposals were found to cause harm to the listed building or any other heritage asset, then the degree would lie within the less than substantial spectrum and would need to be weighed against the public benefits of the proposal in accordance with the relevant NPPF tests.

In order for a building of this scale in this location to be supported and meet the objectives of DMS4, it would need to be of the highest design quality, deliver significant planning benefit that is commensurate to its scope and nature, re-provide the existing amount of commercial floorspace, and provide affordable housing in accordance with the Mayors ‘Fast Track Route’.

A potential benefit the proposal could deliver would be improvements to access to the river walk in front of the Glassmill Building. This section is convoluted and simplifying and enhancing the layout should be explored as a potential public benefit. Activating

the river frontage and Battersea Bridge Road frontage would enhance the public realm. The Battersea Bridge Road frontage needs carful consideration when managing the changing levels.

Affordable Housing
London Plan Policy 3.12 seeks the maximum reasonable amount of affordable housing to be provided. The Mayor's Affordable Housing and Viability SPG has now been adopted (August 2017) and this establishes a minimum London threshold level of 35% affordable housing (without grant) with an overall strategic target of 50%. Wandsworth requires viability testing for less than 50%.

In the event that a less than 50%, tenure compliant scheme is presented a full viability report will need to be submitted to the Council and this will need to be independently assessed by a viability consultant at a cost to the applicant.

Details of the affordable housing offer should be fully discussed with the Council and the Council's preferred Registered Providers prior to submission of any application.

Housing Mix
It should be noted that the mix should comprise of no more than 20% one-bedroom units (5% for one-person/studio) and at least 5% three-bedroom units, although this can be applied flexibly in light of individual site circumstances, including location, site constraints, sustainable design, the need to provide mixed and balanced communities, viability and the availability of public subsidy.

If affordable housing is offered, then the unit mix for the different tenures can be found within Table 3.1 within Policy DMH3.

Neighbour Amenity
As a result of the proposed building heights, there could be potential loss of sunlight / daylight and overshadowing experienced at neighbouring properties. A daylight / sunlight and overshadowing assessment would need to be provided, and the results would be a material consideration for assessing any proposals for a tall building at the site. Both VSC and NSL tests in accordance with BRE guidelines should be undertaken along with sunlight impacts to neighbours.

The development of the south portion of the site would likely result in significant harm to the daylight and outlook of the east facing windows of the residential units within No. 6 Hester Road, which serve living rooms. It is therefore suggested that the option that extends over the south portion of the site is not progressed further.

Given the separation distances and the presence of the existing building, it is unlikely that the additional mass of the building would cause harm to the outlook of the No. 6 Hester Road units.

It is thought that the Thameswalk Apartments are orientated to face the river with the rear windows serving corridors.

Future occupants of residential accommodation
Policies DMS1, DMH4, DMH6, DMH7 and the Housing SPD set out the Council's requirements for new housing. All proposed dwellings would need to meet the floor areas required by the Nationally Described Space Standards for the range of dwellings

proposed. Furthermore, the room sizes and ceiling heights will need to comply with the Nationally Described Space Standards.
A daylight report will demonstrate the residential accommodation would meet ADF requirements.

The residential units should be dual aspect and only single aspect north facing rooms should be avoided.

Each one and two bedroom unit would ordinarily require a minimum 10sqm of private amenity space and a 3+ bedroom unit would require 15sqm of private amenity space. The London plan requires balconies and terraces to have minimum depths of 1.5m. Shortfalls in dedicated private amenity space due to architectural detailing purposes can be compensated through a suitably sized, sited and landscaped communal space.

Both roofs of the buildings present possibilities to be used as roof terraces. The South Block would appear to have sufficient space to accommodate a play area.

Highways and Transportation
The PTAL is 3 and car parking provision is low. Further details are needed about car parking / disabled and EVCP provision, cycle parking and provision for deliveries / refuse collection.

It is recommended that you contact TfL as Battersea Bridge Road is on the TfL network.

Any application will require a Transport Assessment, Travel Plan, Delivery and Servicing Plan, Construction Management Plan and Car Park Management Plan.

Waste and Refuse
You are advised to read the Council's Refuse and Recyclables in Development SPD and ensure sufficient waste storage is provided within the site for all the residential and commercial units.

Key points to note for residential units:

- Developments with 5 or more flats are required to use communal wheeled bins of at least 660 litres, wheeled bins smaller than this will not be serviced. This is also preferable for developments with three or four flats, although they can use ordinary dustbins where it is not practicable.
- At least 150 litres refuse capacity plus 70 litres for mixed recycling per flat must be provided.
- Collection vehicles must be able to wait legally within 10m of the wheeled bin locations and within 25m for dustbins.
- An allowance of 150mm is recommended between bins / bins and walls etc.

It is advised that you calculate the likely volume of commercial waste arising based on the British Standard for waste management in buildings and propose refuse & recycling storage capacity and collection frequencies on that basis.

Flood risk and Sustainable urban drainage systems (SUDS)
As the site is in flood zones 2 and 3a, a detailed flood risk assessment would be required, which would be subject to consultation with the Environment Agency. The relevant criteria as set out in policy DMS5 of the local plan would need to be met.

SuDS should be provided in accordance with policy DMS6.

Environmental health (noise, air quality and contaminated land)
The applicant's attention is drawn to policies DMS1 and IS4 as well as relevant national and London-specific guidance such as the Mayor's Guidance 'The Control of Dust and Emissions during Construction and Demolition" SPG.

Draft London Plan Policy SI1 'Improving air quality' and London Plan policies 5.3 and 7.14 aim to ensure that new developments are designed and built to improve local air quality and reduce the extent to which the public are exposed to poor air quality. The development is located in an area where it is understood that air quality limits are being exceeded and therefore appropriate mitigation measures should be included.

Further advice from the Council's Environmental Health officers should be sought in relation to the noise and air quality environment on Battersea Bridge Road.

Sustainability
The proposal will need to be designed in accordance with the sustainability standards contained in policies IS2, DMS3 or such equivalent standards that replace them, as well as policy 5.2 of the London Plan.

Any application would need to be accompanied by a preliminary assessment report demonstrating how the relevant standards will be met. Design-stage and post-construction reviews will generally be required by conditions.

The possibility of future proofing the development with the capacity to connect to a future heating network should be explored.

The NPPF requires local authorities to support the move to low carbon futures by planning for new development which reduces greenhouse gas emissions; actively support energy efficiency improvements to existing buildings and expect new developments to attempt to minimise energy consumption through landform, layout, building orientation, massing and landscaping.

Core Strategy policy IS1 covers sustainable development including mitigating and adapting to climate change and promoting a sustainable relationship between development and transport. Policy IS2 covers sustainable design, low carbon development and renewable energy.

Policy DMS3 of the DMPD provides direction regarding information requirements to demonstrate compliance with the Core Strategy Policies.

The emission reduction targets set in the London Plan for major developments are zero carbon (as set out in Policy 5.2 of the London Plan and Standard 35 of the Mayor's Housing SPG) for residential development and 35% below Part L 2013 for commercial development. Minor residential development should achieve a 19% carbon dioxide reduction. For major residential development at least a 35 per cent reduction in regulated carbon dioxide emissions (beyond Part L 2013) should be on-site. The remaining regulated carbon dioxide emissions, to 100 per cent, are to be off-set through a cash in lieu contribution. The Council is currently considering the approach to implementing the London Plan zero carbon and carbon offsetting policy.

The residential development should achieve a maximum water use of 105 litres per person per day (plus 5 litres for outside use) in line with the Water Efficiency Calculator for new dwellings from the Department of Communities and Local Government.

In regard to the commercial element of the proposal, DMPD policy DMS3 requires that this element of the proposal meets BREEAM rating Excellent until the end of 2018 or Outstanding at the beginning of 2019 and onwards.

The applicant is encouraged to explore energy saving measures as well as incorporating a range of renewable energy sources within the development.

In any future application, Climate Integrated Solutions (CIS) (the Council's external sustainability consultants) would be consulted and require a fee to be paid by the applicant.

Archaeology
As the site lies within an archaeological priority area, the applicant is encouraged to engage with Historic England's Greater London Archaeological Advisory Service (GLAAS).

In accordance with policy DMS2 of the local plan, any application will need a desk-based archaeological assessment and may also require field evaluation. The recording and publication of results will be required and in appropriate cases, the Council may also require preservation in situ, or excavation.

Impacts on the heliport
The application site is located in an area where any development above 30m is subject to consultation with the London Heliport. The applicants are encouraged to engage with the London Heliport. Any proposals for the site would need to demonstrate that the heliport would not be adversely affected by the building height proposed.

Planning Obligations
The applicants should review the Council's Planning Obligations SPD, as any planning permission granted would be subject to obligations secured through a Section 106 agreement. These are likely to include amongst other things:

- Highways improvements
- Provision of affordable housing and workspace
- Arts and Cultural Plan or contribution
- Employment and Skills Plan and contribution
- Open Space provision or contribution
- Connection into any future district heat network.

Conclusion
The proposed development has the opportunity to replace a poor quality building with one of the highest quality to visually sign-post this gateway to the borough.

Within the proposed development appropriately sized and managed office spaces can help further regenerate this emerging cultural quarter within this part of the borough.

It is considered that the width of the taller building needs further analysis to reduce its impacts upon the roofscape and streetscene. At present, it is considered that the broad width combined with the height could give the building an overly emphasised physical

presence within its context. A more slender building would be appropriate for such a tall building in this prominent location.

Furthermore, to justify a building of such height in this location it would need to be of the highest design quality, deliver significant planning benefit including significant public realm improvements, re-provide the existing amount of commercial floorspace, and provide affordable housing in accordance with the Mayors 'Fast Track Route'.

It is anticipated that the design and articulation of the buildings would be of the highest quality befitting of such a prominent building.

You are encouraged to seek the views of the GLA as the proposal would be referable to the Mayor, and TfL as Battersea Bridge is on the TLRN.

It would be expected that the applicants would enter into a Planning Performance Agreement with the Council prior to the submission of a formal planning application.

Submission documents
In any formal submission for planning permission you are advised to submit the following:

- Application Form & CIL Form
- Air Quality Assessment
- Air Quality Neutral Report
- Archaeological Assessment
- Contaminated Land Report
- Design & Access Statement
- Energy Statement
- Flood Risk Assessment
- Heritage Assessment
- Noise Assessment
- Planning Statement
- Statement of Community Involvement
- Sunlight/Daylight Assessment
- Sustainability Statement
- Tall Building Assessment
- Transport Assessment
- Travel Plan

The Mayor of London's CIL charge in Wandsworth is £50/sqm of internal floorspace. Wandsworth's own CIL came into operation on 1st November 2012 with the rate being £250/sqm of additional internal residential floorspace, in addition to the Mayor's charge. Further details about CIL are available from the CIL team at cil@wandsworth.gov.uk.

I trust this letter clarifies the position of the Council with regard to your proposal. The information provided is an overview of your proposal and the observations and comments contained in this letter are for general guidance purposes only and are not binding on the Council. I would like to make it clear that the observation and guidance contained in this letter are primarily Officer's views and in order for planning permission to be granted, any subsequent application may need to gain the approval of the Planning Applications Committee. The information contained within this letter is valid for the period of one year. Any substantial changes to the proposal would also affect

the relevance of this letter. The issues raised within the body of this letter are not an exhaustive list and other unforeseen issues may arise during the assessment of any future application.

Yours sincerely,

Thomas Wilson

Senior Planning Officer
for Assistant Director of Planning and Development

Appendix 2. Townscape Narrative

Wandsworth Local Plan Publication (Regulation 19) Consultation Version (January 2022)

Representation on behalf of Promontoria Battersea Limited by the Tavernor Consultancy: Townscape and Built Heritage

28 February 2022

Wandsworth Local Plan Publication (Regulation 19) Consultation Version (January 2022)
Representation on behalf of Promontoria Battersea Limited by the Tavernor Consultancy: Townscape and Built Heritage

Contents: **Pages**

Key to highlights in Appendices:
Yellow – emphasizes key text in document
Blue – Tavernor commentary

Wandsworth Local Plan Publication (Regulation 19) Consultation Version (January 2022)

COMMENTARY

Introduction

1.1 This commentary of the Wandsworth Local Plan Publication (Regulation 19) Consultation Version (January 2022) has been written by the Tavernor Consultancy, architectural consultants specializing in townscape and built heritage impacts, on behalf of Promontoria Battersea Limited. Our commentary focuses on the Thames Riverside of Battersea, at the bridgehead of Battersea Bridge, and specifically the site at 1 Battersea Bridge in which Promontoria Battersea Limited have a development interest.

1.2 Our commentary considers London Borough of Wandsworth's (LBW) Local Plan Publication in the context of the ARUP urban design study of December 2021, on which it is based. Passages relevant to the site at 1 Battersea Bridge are quoted in the two appendices that follow this commentary: text highlighted yellow in the appendices emphasizes key text in ARUP and LBW's documents, Tavernor comments on that text are highlighted blue. The LBW Local Plan Publication is included as an appendix here to demonstrate its reliance on the ARUP report.

ARUP's Urban Design study (December 2021)

2.1 All references in this section of our commentary relate to the ARUP study unless stated otherwise.

2.2 The Executive summary (pp. 1-15), states that the Urban Design Study was commissioned by LBW to provide a townscape character assessment, alongside other necessary evidence, to enable the Council to deliver a design led approach to meeting its housing targets through the emerging Local Plan (p. 1, para 1). The urban design study is intended to provide 'the best possible evidence' (p. 1, para 7): the earlier December 2020 version of the ARUP study having helped inform LBW's approach to tall building in the earlier Regulation18 Draft Local Plan.

2.3 To this end, ARUP divided LBW into character areas, each of which are described and evaluated to draw out valued features and negative aspects for enhancement. The key characteristics and qualities of character areas are verified on site, in discussion with stakeholders and through community engagement. (p. 3)

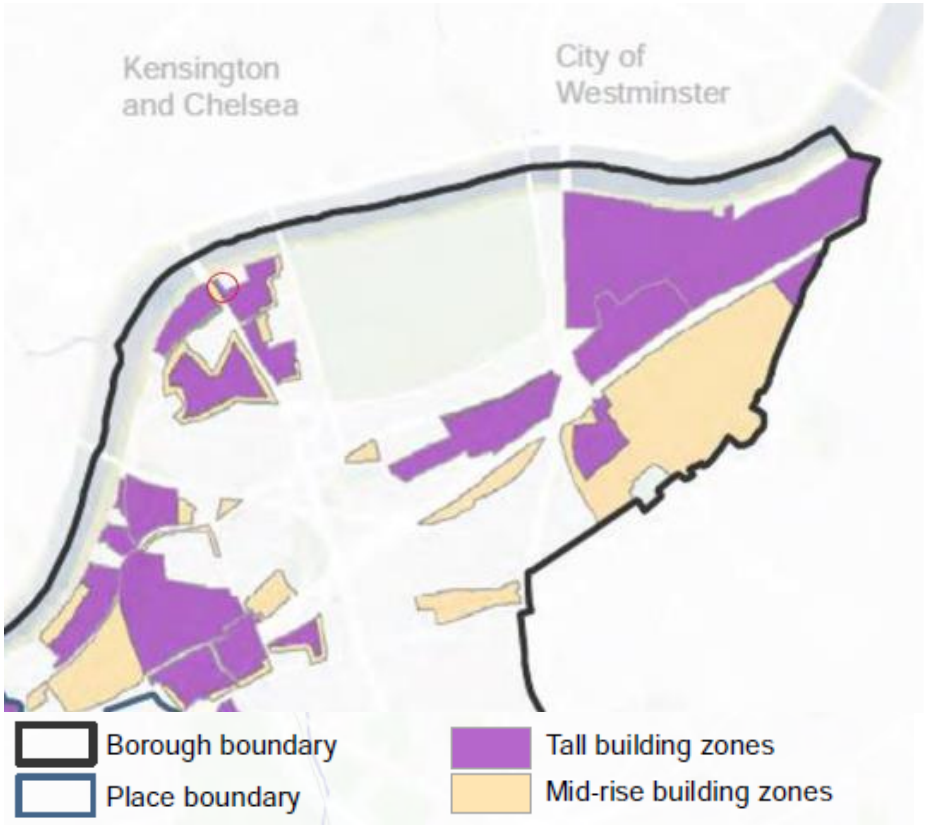
2.4 In consideration of the 'capacity for growth' in LBW the capacity for growth is determined by assessing the sensitivity of the character areas to establish high sensitivity areas unlikely to have capacity for development without adverse effects on the townscape; alongside areas of medium and low sensitivity with the potential for targeted or larger scale growth. Simultaneously, the 'probability' of change is assessed: sensitivity and probability are considered together to understand the potential development capacity. (p. 3)

2.5 Battersea Riverside is part of the Battersea character area – one of seven places in Wandsworth. (p. 6) Battersea Riverside is depicted as having a 'mixed riverside frontage'.

Caption in Executive Summary: '**Battersea's mixed riverside frontage**'.
(NB. The same image is referred to in the body of the main document, at Fig. 61, with the caption '**Battersea's mixed riverside frontage illustrating new and old landmarks in close proximity**'.)

2.6 The site is located in an area with **'lower' sensitivity** on the 'Sensitivity plan' (shaded light blue, p. 8). It is defined as having a **'lower/medium' probability of change** (shaded orange, p. 9), and a **'medium' capacity for change** (shaded pale yellow, p. 10). In terms of an 'Overall development strategy' for the specific River Thames frontage in which the site is located it has **a medium capacity for development** (see map on p. 11).

2.7 It is stated that: '*Overall, Wandsworth has capacity for tall buildings in a number of strategic and more local locations. Opportunities for tall buildings are generally concentrated within three different types of area:* ***1. Along the River Thames frontage*** […] *However, the impact of riverside development goes well beyond the borough boundaries and therefore must continue to be carefully planned to protect the character of both banks and the overall historic and cultural importance of the River Thames as a globally recognised characteristic of London*'. (p. 12) Furthermore: '*An area being designated as a tall building zone does not mean it has capacity to receive tall buildings within the appropriate range across the whole extent*'.



Plan above is an extract from the 'Tall and mid-rise building zones borough overview map' (p. 14): site circled in red

2.8 The site is included in between a 'mid-rise' and 'tall building zone' definition: the 'mid-rise' colour apparently relating to the street frontage. This represents a change of thinking from an earlier December 2020 version of ARUP's study, which shows the purple shading spreading across the main road (see map details for comparison below). **NB**. The 2020 version helped inform LBW's approach to tall building in the earlier Regulation18 Draft Local Plan.

Extract from ARUP December 2020 study at Fig. 15: 'Tall buildings opportunity map'. Site circled red.

2.9 There is no explicit rationale provided for this modification. Nor is it consistent with the main text in Section 3 of ARUP's Urban study in relation to 'B2 Battersea Riverside' (p. 60ff.). The 'Key Characteristics' of this area are: a '**mixture of uses**', '**coarse urban grain, with large scale buildings**', and a '**mixture of building heights: buildings fronting the river rise to 18 storeys high**', including **landmark modern buildings**. The area has an '**urban feel**, with limited tree cover', with **the River Thames providing a sense of openness**. (p. 60)

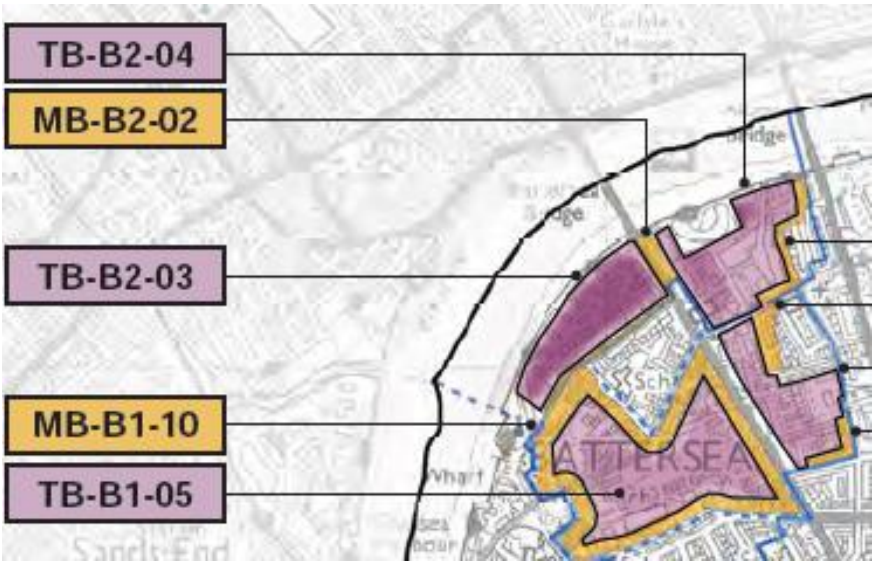
2.10 No specific 'valued' views of the site are indicated in the study or the Local Views SPD (p. 62). As regards to 'sensitivity' it is stated that: '***additional height could be accommodated*** *as long as development* ***provides additional public open space around the river and respect the area's valued features***', which include: '*the area's role as* ***a visual backdrop and setting to the river in views from RB Kensington & Chelsea; the setting and views in and around Battersea Park***'. (p. 63) This leads to the conclusion in the caption to Fig. 74, that: '*Overall,* ***Battersea Riverside has a low sensitivity to change with potential for targeted growth***'. (p. 63)

2.11 This is a reasoned conclusion by ARUP, which applies to the potential for height and growth along Battersea Riverside in general. While detailed height studies are made by the authors of a range of sites in the appendices to their urban study, they make no specific study of the potential of the Battersea Bridge bridgehead for a tall landmark modern building fronting the river, where existing tall buildings are more generally already in evidence. In the absence of such a study ARUP's assumptions that the site has only medium potential for height are both unfounded and inconsistent with their general conclusion for Battersea Riverside.

2.12 Furthermore, ARUP's 'Character area design guidance' (p. 63) provides principles to be applied, which could be used to shape and scale an appropriate development brief for the site, including:

> *Aspire to creating a continuous, connected and legible Thames Path route along the river* […]
>
> *Create references to historic pattern, uses and elements where possible to bring coherence, legibility and integrity to the character area.*
>
> *New development should have a distinctive character that creates remarkable landmarks. It should provide excellent and inviting public realm as part of a coherent strategy rather than spaces between buildings. Active frontages to the Thames Path should be provided.*
>
> *Preserve linear views along the river.*
>
> *Consider a wider public realm or cultural strategy to create a sense of coherence between the many different elements along the riverside.*
>
> *Encourage a mixture of uses to increase activity and vibrancy along the riverside.* (p. 63)

2.13 However, Appendix A, Fig. 244 (p. 218) identifies the site and adjacent zones as illustrated in the following extract:



2.14 As stated already, no specific study is provided by ARUP that leads to this illustrated conclusion, nor the broad overview conclusion regarding the assumed appropriate heights at Table 2 on p. 213 for the sites on either side, set out as follows:

Zone	Place	Character area	Appropriate height range (storeys)	Appropriate height range (m)	Justification
TB-B1-03	Battersea	Battersea Residential	7 to 20	21 to 60	Analysis of scenario
TB-B1-04	Battersea	Battersea Residential	7 to 12	21 to 36	Analysis of existing buildings

2.15 The potential range for future tall building heights in the area to the immediate west of the site is between 7-20 storeys and up to 60m. For the area to the immediate east, it is only 7-12 storeys and up to 36m. No height scenarios have been tested for these tall building areas, and no rationale is given why the Promontoria Battersea Limited site should be regarded as only suitable for mid-rise heights – with heights lower than the adjacent areas: the site is labelled as site MB-B2-02 in the map on p. 201, with a shading indicating it is suitable for mid-rise buildings up to 6 storeys (18m).

2.16 Section 4 of the Urban Design Study considers the capacity for growth in the borough (specifically in relation to tall buildings) using the findings of the characterisation study. It states that: '*In line with the London Plan, the borough of Wandsworth has developed a local definition of a tall building*

to be applied across the borough.' The reference is to new London Plan (2021) and the new emerging Local Plan for Wandsworth. (p. 161), and cross-refers to **Section 4.5 Tall buildings** (p. 173) and specifically **Part B of Policy D9 of the London Plan**.

2.17 In this context we are aware of the very recent **Master Brewer Judgement** in the High Court in relation to the Tall Buildings Policy D9 in the London Plan (*Master Brewer Judgement 15 December 2021: [2021] EWHC 3387 (Admin); Case No: CO/1683/2021*). It is concluded there that, read straightforwardly and objectively and as a whole, policy D9:

i) requires London Boroughs to define tall buildings within their local plans, subject to certain specified guidance (Part A);

ii) requires London Boroughs to identify within their local plans suitable locations for tall buildings (Part B);

iii) identifies criteria against which the impacts of tall buildings should be assessed (Part C); and

iv) makes provision for public access (Part D).

In considering whether to grant planning permission for a tall building not identified in the development plan, it was concluded that the proposal should be assessed by reference to the potential impacts which are listed in Part C, in accordance with the objectives of Policy D9.

Final conclusions

2.18 It is evident that the LBW Regulation19 Draft Local Plan is based firmly on the ARUP urban design study, and that – while a number of sites were selected by ARUP for detailed study regarding height – the 1 Battersea Bridge site was not one of them. The heights set out for immediately adjacent areas are regarded as suitable for tall buildings, but the heights proposed are a response to existing heights rather than exploring the potential of these sites within the constraints the ARUP report establishes. No rationale is given as to why the site at 1 Battersea Bridge Road site is only appropriate for a mid-rise building.

2.19 There is London-wide precedent for tall and/or landmark buildings at the bridgehead of major river crossings – Lombard Wharf marking the Battersea Railway Bridge provides a local example. There are other Thames riverside examples, such as One Blackfriars marking Blackfriars Bridge in Southwark, or Vauxhall Cross and the Nine Elms tall building cluster landmarking Vauxhall Bridge and the nearby transport interchange in Lambeth.

2.20 The recent **Master Brewer Judgement** in the High Court makes it clear that design proposals are to be tested with different heights and massing to assess their visual impact in relevant views. Likewise, only once tall building proposals are tested on the 1 Battersea Bridge Road site can it be concluded what height may or may not be appropriate there. The Tavernor Consultancy have assessed a range of tall building heights for 1 Battersea Bridge Road in relation to views locally – views relating to local conservation areas and listed buildings – and along and from across the River Thames, including from RBKC and LBHF.

2.21 It is our conclusion – in relation to ARUP's own study regarding potential building heights in the context of Battersea Riverside, and with reference to the specific zone in which the site falls, at its bridgehead – that a tall, and potentially landmark building, is entirely appropriate for 1 Battersea Bridge Road. Furthermore, in townscape terms, we firmly believe that a tall building would be more appropriate here than a mid-rise building.

APPENDIX 1
ARUP
Wandsworth Borough Council
Urban Design Study: Characterisation, development capacity and design guidance (December 2021)

Executive summary (pp. 1-15)
This Urban Design Study has been commissioned by the London Borough of Wandsworth to provide a townscape character assessment, alongside other necessary evidence, to enable the Council to deliver a design led approach to meeting its housing targets through the emerging Local Plan. The study brings together the values, character and sensitivity of different parts of the borough with the reality of future development pressures. (para 1)
[…]
In recent years, high-rise mixed use developments have become increasingly a feature of the Thames riverside in areas previously occupied by heavy industry such as in the Nine Elms Opportunity Area around Battersea Power Station. (para 6)

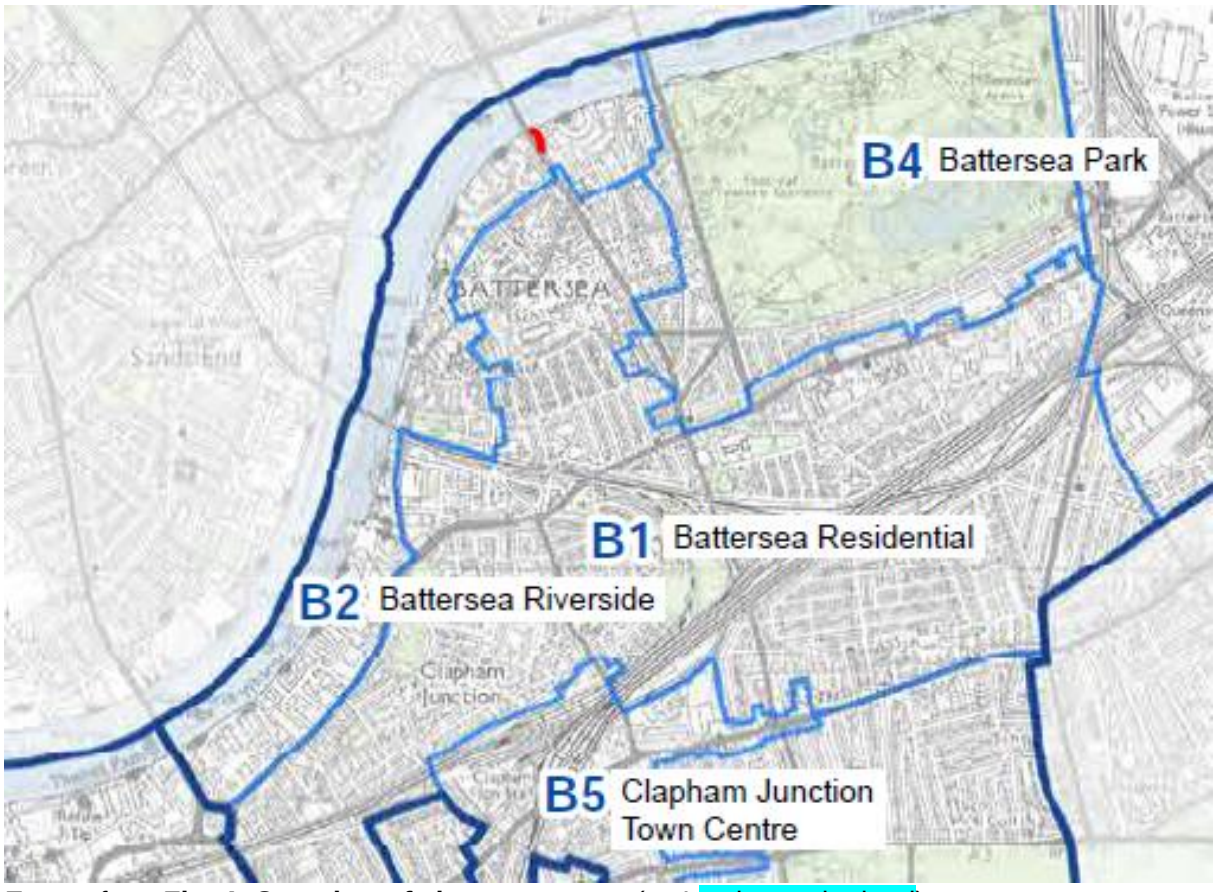
Wandsworth is an ambitious and proactive borough that desires to drive positive change with a focus on appropriate, well-planned delivery. This commitment to change includes maximising the supply of housing for the Borough. This is only achievable through ensuring the Local Plan policies and site allocations remain up to date, fit for purpose and are supported by the best possible evidence in order to be effective and robust. (para 7)

Characterisation (p. 3)
The baseline characteristics of the borough as a whole are reviewed, including consideration of physical, cultural, perceptual and social qualities.

The borough is then divided into character areas, each of which are described and evaluated to draw out valued features and negative aspects for enhancement. The key characteristics and qualities of character areas are verified on site, in discussion with stakeholders and through community engagement.

Capacity for growth (p. 3)
The capacity for growth is determined by assessing the sensitivity of the character areas to establish high sensitivity areas unlikely to have capacity for development without adverse effects on the townscape; alongside areas of medium and low sensitivity with the potential for targeted or larger scale growth. Simultaneously, the 'probability' of change is assessed, analysing the borough in terms of aspects such as public transport accessibility, land availability and planning policies. Sensitivity and probability are considered together to understand the potential development capacity of the borough.

The development capacity map is used to establish areas which may be able to accommodate tall and midrise buildings, tested against hypothetical scenarios.



Extract from **Fig. 4: Overview of character areas** (p. 4 – site marked red)

The seven Places of Wandsworth (p. 6 – Battersea being one of the '7')
Battersea (p. 6)
Before the industrial revolution much of the Battersea area was farmland known as 'Battersea Fields'. The flat, fertile soils of the Thames floodplain were cultivated for market gardening. The area stretches along the River Thames, with the 83ha listed Battersea Park at its centre. The area is now also home to one of the largest regeneration projects in the country - focused around the grade II listed Battersea Power Station. The character, which includes the town centre of Clapham Junction and the area around Clapham Common, is typified by a Victorian and Edwardian townscape with a large number of important listed buildings.*

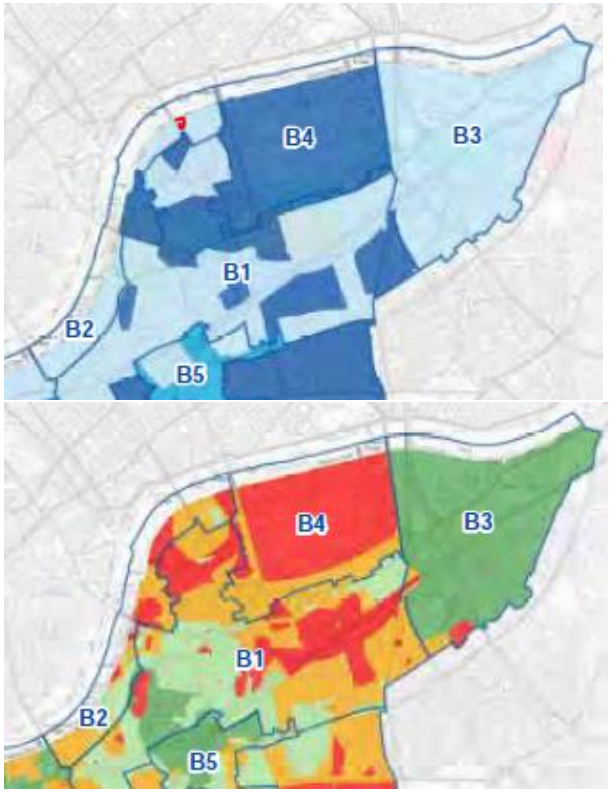
However, the view provided with the text – below – is (apart from the **Grade I listed St Mary's Church**) dominated by modern housing, including tall blocks.

Caption: '*Battersea's mixed riverside frontage*'

Capacity for growth (p. 8)
An assessment was undertaken of the borough's capacity for tall buildings and small site development, using the characterisation study as an evidence base. The assessment considers sensitivity and 'probability' of change together, as set out in the methodology.

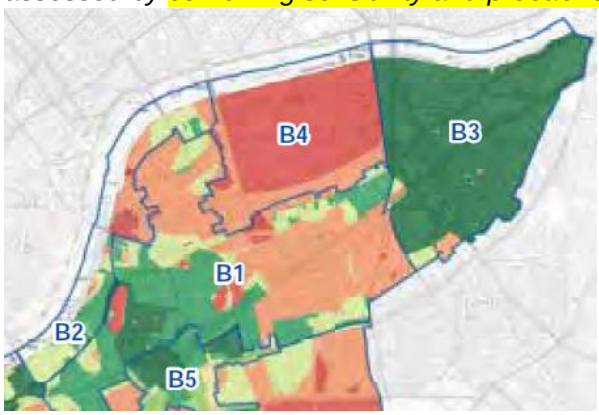
Sensitivity
Areas with a lower sensitivity include estates within East Putney and Battersea; parts of Upper Richmond Road within Putney Town Centre; stretches of Wandsworth Riverside and the Wandle Valley; areas around St George's Hospital near Tooting; modern estates around Church Lane in Tooting; the supermarkets and car parking within Balham Town Centre; and the Nine Elms Opportunity Area.
The site is located in an area with 'lower' sensitivity (light blue: see the extract from the 'Sensitivity plan' (p. 8) below.

Probability of change (p. 9)
'Probability' of change (also known as 'likelihood' of change) is an assessment of how likely it is for different areas to come forward for development. Factors which give rise to a higher probability of change include areas which are already designated for development […] *Areas with high levels of accessibility (i.e those with a high public transport accessibility level, or PTAL) also have a higher probability of change* […] *On a site-by-site basis, there will be a number of factors that influence probability of change which generally covers much of the northern and south eastern extents of the borough.*
The site is located in an area with '*lower'* sensitivity (light blue), and a '*lower/medium*' probability (orange): see the extracts from their Fig. 12 below.



Extracts from **Sensitivity plan** (p. 8) top, and **Probability of change** plan (p. 9) bottom.

Development capacity (p. 10)
The development capacity of different parts of the borough for tall buildings is assessed by combining sensitivity and probability of change together.



Extract from **Capacity for Change** plan (p. 10)

Green and pale yellow areas generally have a high probability of change or a lower sensitivity to change.
According to the colour scale on the map the site – is pale yellow – which I assume equates to a 'medium' capacity for change. Battersea PS site is dark green – at the 'higher' level and Battersea Park is red at the 'lower' level.

The development capacity, existing tall buildings and consented tall buildings mapping helps to inform an overall strategy for development of increased height across the borough. […]

[…T]*he strategy for tall buildings focusing on the Nine Elms Opportunity Area, the five town centres (Balham, Clapham Junction, Putney, Tooting and Wandsworth), the River Thames frontage through Wandsworth and Battersea and known areas with emerging masterplans or major planning applications*.

Extract from: **Strategy for mid-rise and tall building development across the borough** (p. 11)
The site is clearly included.

Tall building capacity (p. 12)
[…] *The differences in character and sensitivity also mean that the height of a building for it to be considered "tall" varies. For the purposes of this study we have defined a tall building as:*

> *Buildings which are 7 storeys or over, or 21m or more from the ground level to the top of the building, whichever is lower.*

Using this definition, the opportunity map establishes, for each character area (and where relevant sub-areas), the prevailing existing building height and the specific tall building height. The accompanying criteria for each character area/sub-area which must be considered throughout the development of any tall building proposals.

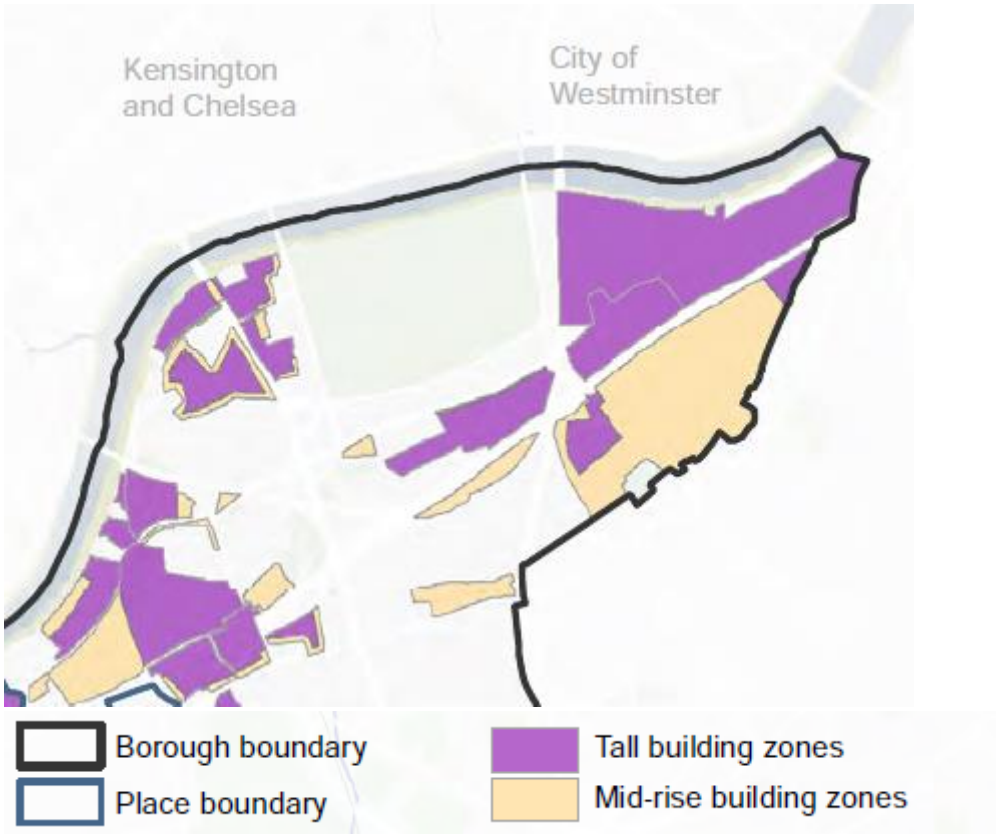
Overall, Wandsworth has capacity for tall buildings in a number of strategic and more local locations. Opportunities for tall buildings are generally concentrated within three different types of area:

> ***1. Along the River Thames frontage** including within the Nine Elms Opportunity Area: Here, until recently, commercial and industrial uses have dominated. There are opportunities for tall buildings to respond to the large scale and width of the riverside. However, the impact of riverside development goes well beyond the borough boundaries and therefore must continue to be carefully planned to protect the character of both banks and the overall historic and cultural importance of the River Thames as a globally recognised characteristic of London. Nine Elms is located within London's Central Activities Zone and is the site of significant tall building development*

in recent years. In particular any proposals need to assess and avoid impacts on the Palace of Westminster and Westminster Abbey including St Margaret's Church World Heritage Site in the nearby City of Westminster on the northern bank of the Thames. Tall building applications in the Wandsworth riverside area would need to have particular regard to historically sensitive sites on the north bank such as Fulham Palace Scheduled Monument. A policy on character and design in relation to the River Thames and the Thames Path (or a sub-policy contained within the general policy) would be beneficial considering its importance shown through some of the character area assessments.

Two other areas include: 2. Within town centres, and 3. Within or adjacent to existing estates and emerging major regeneration masterplans

An area being designated as a tall building zone does not mean it has capacity to receive tall buildings within the appropriate range across the whole extent. Every new development will need to consider the specific context of the plot, existing buildings surrounding the plot and any other development proposals in the area including those going through planning, consented schemes and buildings under construction.



Extract from Tall and mid-rise building zones borough overview map (p. 14)

The site is included in between a 'mid-rise' and 'tall building zone' definition: the 'mid-rise colour apparently relating to the street frontage – suggesting that 'canyonisation' is to be avoided at the bridgehead. This is a modification of the original December

2020, which shows the purple shading spreading across the main road (see map details for comparison below):

Detail of 2021 plan above

Detail of 2020 Fig. 15: Tall buildings opportunity map

NB. An overview of 'appropriate heights' in Appendix A is based on existing heights rather than considering the landmark potential of our site. See below.

In the main body of the report, Section 3 considers the Character Areas in more detail.

B Battersea (pp. 54 – 71)
B1 Battersea Residential
B2 Battersea Riverside
B3 Nine Elms Mixed Use
B4 Battersea Park
B5 Clapham Junction Town Centre
B6 Clapham Common and Residential

B2 Battersea Riverside

Fig. 61 Battersea's mixed riverside frontage illustrating new and old landmarks in close proximity

Battersea Riverside follows the River Thames from Wandsworth Bridge to Battersea Park. It includes the Battersea Square Conservation Area: the historic settlement of Battersea. The riverside has been the focus for residential and mixed use redevelopment on former industrial sites. (p. 60)

NB. the photo included in this section contrasts with the 2020 version, in terms of both photo (relationship of St Mary's Church to its background) and title: the final 2021 version is more positive – apparently, the landmark tall buildings are no longer seen as '*competing*':

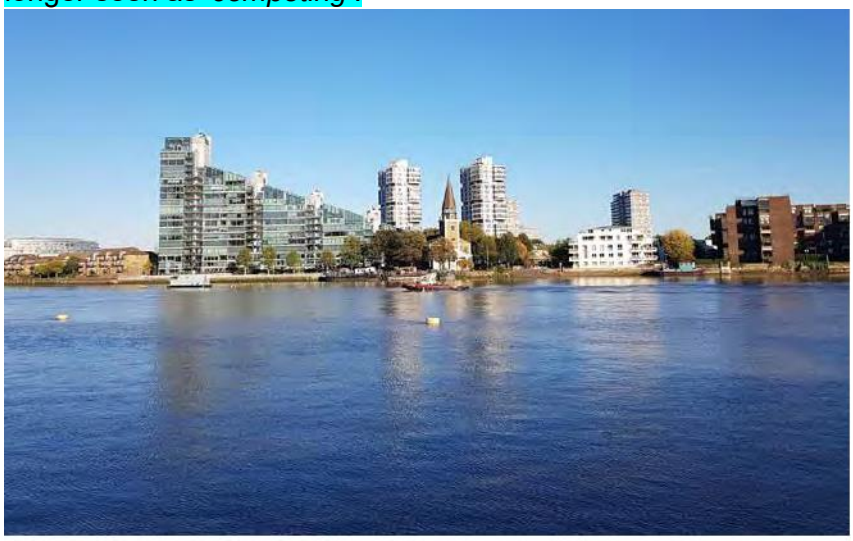


Fig. 87: St Mary's Church nestled among competing landmark buildings on Battersea Riverside including towers in Battersea Residential

Mixture of uses *including commercial, office, industry and residential flats. There are few leisure or entertainment destinations, and much of the area feels 'private'. Some historic industrial buildings have been sensitively re-purposed, such as the Royal Academy of Dance (4 storeys) which occupies a former warehouse. Other sites have been fully redeveloped. There is an* ***absence of activity or vibrancy*** *along much of the riverside, except for around St Mary's churchyard open space. The area ranks relatively poorly in terms of public transport accessibility.*

Coarse urban grain*, with large scale buildings (except for Battersea Square Conservation Area), a mixture of modern and older buildings, as well as trading estates and car dealerships on Lombard/York Road, which have little distinctiveness.* ***A mixture of building heights****: buildings fronting the river rise to 18 storeys high, whilst around Battersea Square they are mainly 2-3 storeys, and provide positive frontage. The differences and diversity of architectural materials and styles result in* ***incoherent character, with little sense of historic character outside Battersea Square Conservation Area.***

Landmarks *include:*

- *Church of St Mary (grade I listed) and Church of the Sacred Heart (grade II listed);*
- *modern buildings (not necessarily all positive);*
- *Albert Bridge (grade II*), Battersea Bridge (grade II), and Cremorne Bridge (grade II* listed);*
- *the former Sir Walter St John School (now Thomas's Preparatory School), dating from 1700 (grade II);*
- *the former Raven inn on Battersea Square with its distinctive Dutch gables and quoins.*

An urban feel, with limited tree cover *or open space and often uninviting public realm, with the exception of the Battersea Square Conservation Area including St Mary's churchyard and Vicarage Gardens and nearby street trees on Vicarage Crescent. Brick walls fronting the road here add historic character and help to define the street. The River Thames provides a sense of openness and richness from the houseboats near St Mary's Church.*

Extract from **Fig. 70: B2 Battersea Riverside character area plan** (p. 69)

Valued features (p. 62)
[…]
• *The River Thames, for its sense of openness and access along the Thames Path, a well-used walking and running route; and proximity to Battersea Park.*
[…]
• *Valued views, including the view from Battersea Bridge and from the riverside promenade, looking east downstream to Albert Bridge (listed grade II*) (Fig. 73), as described in the Local Views SPD.*

Fig. 73: View from the riverside promenade looking downstream to the listed Albert Bridge

Other views and vistas of interest include:

- views across the Thames into RB Kensington & Chelsea with trees and historic buildings providing a scenic backdrop;

- views up and down the river, such as the stretch from the quay around the slipway adjacent to St Mary's Church to the houseboats, and from Vicarage Gardens;

- view of St Mary's Church from Battersea Square and from Battersea Church Road.

Negative qualities (p. 62)

• Some imposing landmark buildings which due to their large massing appear monotonous and lack a local distinctiveness.

[…]

• Incongruous elements with awkward juxtapositions fragment the character, e.g. the Monteveto building which dominates the views around St Mary's Church Church; the 1970s flats on the riverside west of Vicarage Crescent whose layout, form and scale contrast with and detract from the character of Battersea Square Conservation Area;

[…]

• Poor legibility, particularly east-west access to the river.

• Highly developed, monotonous frontage to the northern bank of the Thames within LB Hammersmith and Fulham.

Sensitivity (p. 63)

Much of the riverside has been redeveloped, leaving limited opportunity for further growth. However, some of the 1960s-70s residential developments are low-rise and provide poor address to the riverfront. If any of these sites were to be redeveloped, additional height could be accommodated as long as development provides additional public open space around the river and respect the area's valued features, and:

• the area's role as a visual backdrop and setting to the river in views from RB Kensington & Chelsea;

• the setting and views in and around Battersea Park;

• the historic character (both medieval and industrial).

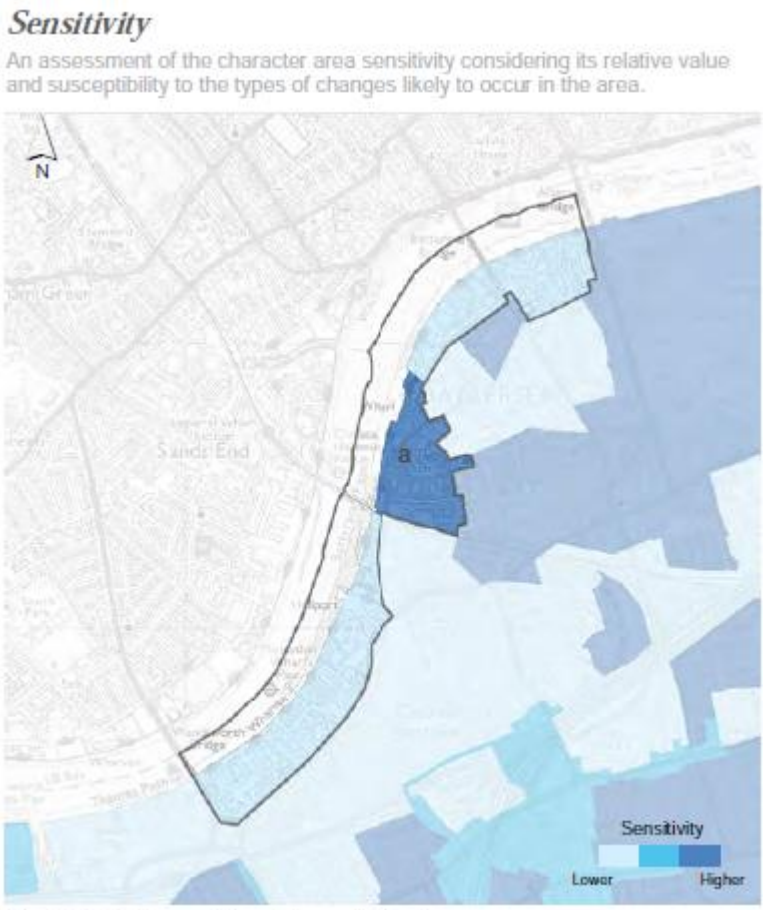


Fig. 74: B2 Battersea Riverside sensitivity plan

The caption to Fig. 74 states that: '*Overall, Battersea Riverside has a low sensitivity to change with potential for targeted growth, with the exception of Battersea Square Conservation Area, which has high sensitivity*'.
NB. The 2020 version states that Battersea Riverside 'has **a medium** sensitivity to change'.

Character area design guidance
An overview of design principles to help achieve the strategy above. See Appendices A and B for guidance on tall buildings and small sites.

- *Aspire to creating a continuous, connected and legible Thames Path route along the river, linked to an enhanced movement strategy to improve connectivity with the wider area - particularly east, including improved crossings over Lombard and York roads and linking to Clapham Junction.*
- *Create references to historic pattern, uses and elements where possible to bring coherence, legibility and integrity to the character area.*
- *Respect and restore historic elements, including St Mary's Church and surrounding green space, but also Victorian industrial buildings.*
- *New development should have a distinctive character that creates remarkable landmarks. It should provide excellent and inviting public realm*

as part of a coherent strategy rather than spaces between buildings. Active frontages to the Thames Path should be provided.

- *Preserve linear views along the river.*
- *Retain the mixed uses including restaurants, cafés and pubs around Battersea Square to maintain a sense of activity and vibrancy.*
- *Develop and enhance the sense of place and focus at Plantation Wharf to aid legibility and quality of experience at this part of the river.*
- *Consider a wider public realm or cultural strategy to create a sense of coherence between the many different elements along the riverside.*
- *Encourage a mixture of uses to increase activity and vibrancy along the riverside.*

Section 4: Capacity for Growth (pp. 160- 209)

4.1 Introduction

This section of the report considers the capacity for growth in the borough (specifically in relation to tall buildings) using the findings of the characterisation study.

[…]

In line with the London Plan, the borough of Wandsworth has developed a local definition of a tall building to be applied across the borough. A tall building is defined as:

"Buildings which are 7 storeys or over, or 21m or more from the ground level to the top of the building, whichever is lower".

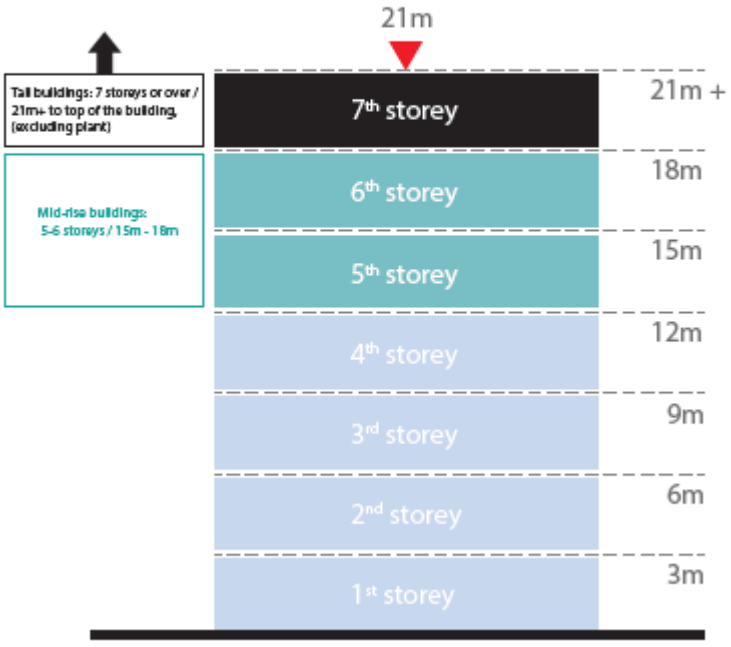


Fig. 211: Definition of a tall and mid-rise building for Wandsworth

It should be noted ***that this study has been prepared in the context of a new London Plan (2021) and the new emerging Local Plan for Wandsworth****. The study follows a design-led approach to identifying tall buildings and is not intended to provide evidence to support buildings which have gone through previous planning processes.*

Refer to ***Section 4.5*** *for tall building zones and further details on appropriate building heights, in principle, for these areas*. (p. 161)

NB. **Section 4.5 Tall buildings** (p. 173) refers to **Part B of Policy D9 of the London Plan**. The ARUP report continues by stating that:

Fig. 220 *on the following page presents an overview map of zones with potential to accommodate tall buildings, in line with the London Plan. Each zone is supported by a description of the appropriate tall building height range for that zone.*

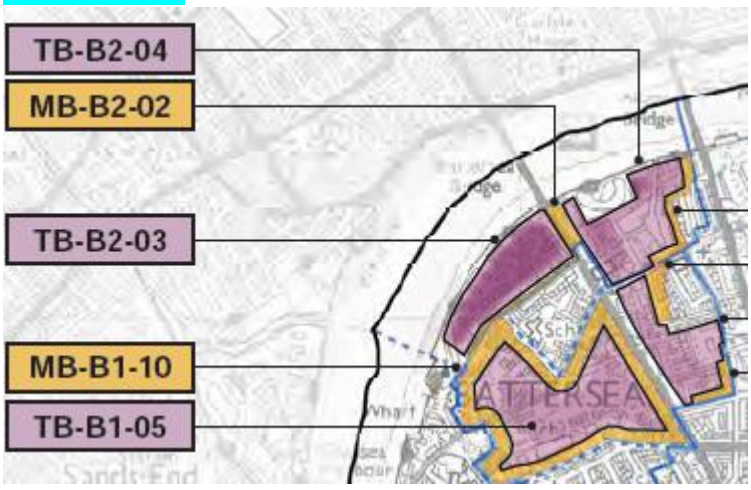
Evidence and information to support the conclusions is contained in ***Appendix A****. The tall building zones have been defined through an analysis of whether they would impact the townscape, local views and nearby heritage assets positively, negatively or neutrally. This assessment has been undertaken using three core types of information depending on the specific zone:*

- *analysis of existing tall buildings;*
- *analysis of consented tall buildings or area masterplans; or*
- *analysis of scenarios prepared specifically for this study.*

4.5.2 Borough-wide findings for tall buildings

Overall, Wandsworth has capacity for tall buildings in a number of strategic and more local locations. An overview of these locations is shown on ***Fig.220****.*

Appendix A, **Fig. 244** (p. 218) identifies the site and adjacent zones as illustrated in this extract:



The site and its locality are further identified on the maps at pages 201 and 228 of the ARUP report. The site is labelled as site MB-B2-02 in the map on p. 201, with a shading indicating it is suitable for mid-rise buildings up to 6 storeys (18m). However, unlike 10 other sites that were selected for testing, there are no accompanying study for the Promontoria Battersea Limited site or those sites on either side labelled in the study as TB-B2-03 or TB-B2-04:

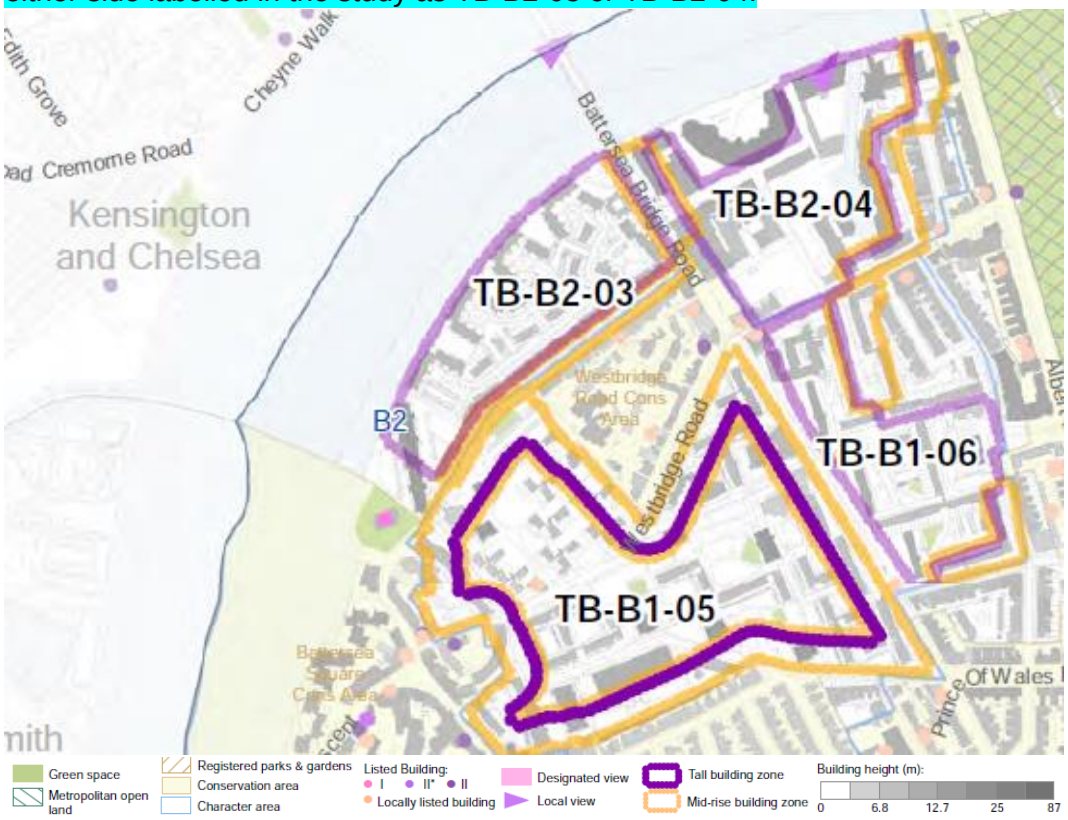


Fig. 265: TB-B1-05 context map

For the flanking areas identified as suitable for tall buildings there is simply an overview provided of what are considered to be appropriate heights at Table 2 on p. 213, as follows:

Zone	Place	Character area	Appropriate height range (storeys)	Appropriate height range (m)	Justification
TB-B1-03	Battersea	Battersea Residential	7 to 20	21 to 60	Analysis of scenario
TB-B1-04	Battersea	Battersea Residential	7 to 12	21 to 36	Analysis of existing buildings

Wandsworth Local Plan
Publication (Regulation 19) Consultation Version (January 2022)

03 Placemaking – Area Strategies
PM9 Riverside Place Based Policy

Map 3.1 (p. 43) – The site of 1BB is in UDS Character Area zone B2
Mapp 3.2 (p. 46) – there is no 'Site Allocation' for 1BB.

PM9 Wandsworth's Riverside
A. Placemaking

1. New development should conserve and enhance the elements and existing feature's that contribute to Putney Riverside's strong character, distinctive sense of place and high-quality townscape. Proposals should:

a. respect the scale and proportions of the existing period buildings and streetscape which is fundamental to the character of the area;
b. protect the openness and framing of vistas towards the river, along Putney Embankment;
c. maximise use of natural materials to integrate with the quality and natural feel of the existing townscape - including stone, timber, period brickwork and planting; and
d. ensure good maintenance of building façades, particularly where they present an active frontage to the Thames Path;
e. provide high-quality public realm, including street furniture which is distinctive to the area; and
f. contribute to the valued leisure functions, including water uses, walking and cycling.

[…]

3. Where appropriate, development proposals should:

a. retain, respect and restore the historic elements of St Mary's Church, Battersea, and surrounding green space.
b. enhance the sense of place and focus at Plantation Wharf to aid legibility and quality of experience at this part of the river.

4. Development proposals for tall or mid-rise buildings in Wandsworth's Riverside will only be supported in zones identified in Appendix 2. Any proposal for a tall or mid-rise building will need to address the requirements of Policy LP4 (Tall and Mid-rise Buildings) as well as other policies in the Plan as applicable.
5. Development proposals will be required to respect and enhance the views and vistas established in the Urban Design Study (2021).
6. Opportunities to enhance the experience and quality of the public realm through carefully considered, well designed proposals that can create beautiful, high-quality, well-designed, accessible, and inclusive public spaces are encouraged. These should provide elements that encourage dwell time, such as seating, parklets and public art, which facilitate community and cultural use. Proposals should use imaginative landscape design that can contribute to the greening of these spaces.

[…]

Policies Map Changes Document (January 2022)

3.2 Local Views

3.2.1 Definition

Six Local Views, as established through the Local Views SPD, are proposed to be added to the policies map.

View 1: Upstream from Putney Bridge

View 2: Downstream from Battersea Bridge

View 3: Downstream from Albert Bridge

View 4: Battersea Power Station from Chelsea Bridge

View 5: From Queenstown Road to Battersea Power Station

View 6: Battersea Power Station from Battersea Park

Only **View 2** is relevant to 1BB:

View 2: Downstream from Battersea Bridge

View 2: Downstream from Battersea Bridge

Figure 24 View 2: Downstream from Battersea Bridge

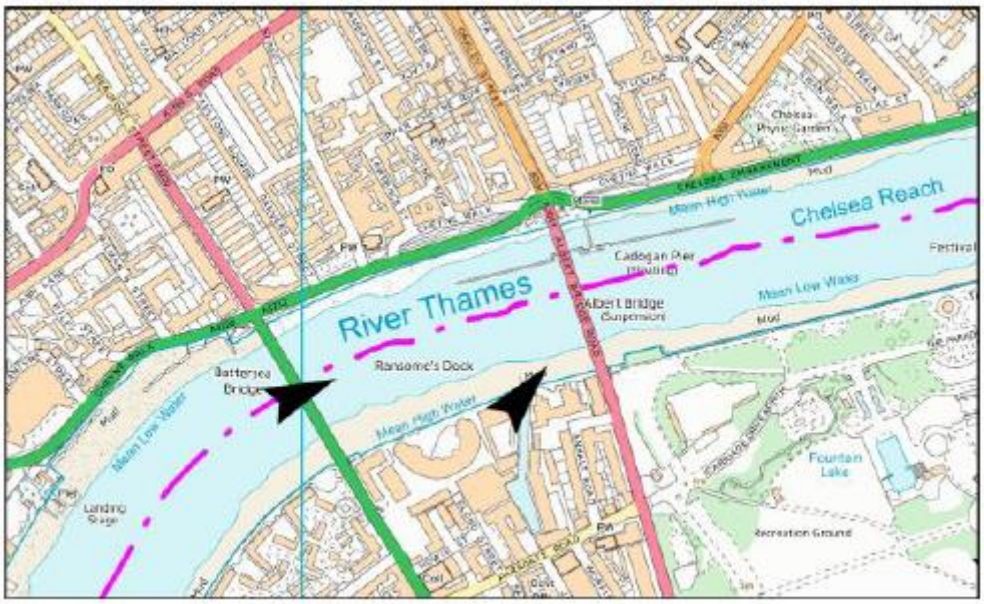


Figure 25 Viewing points for View 2

The site of 1BB is located out of shot, but immediately to the right of the illustrated photographic view. However, two separate view locations are indicated of the associated plan – the second from the Thames Path outside F+P's offices.
The description states:

> ***This view focuses on the grade II* listed Albert Bridge**. *It was designed by R M Ordish in 1873 as a Cable Stayed bridge partly suspended and partly cantilevered. The bridge represents a local landmark, and is a feature at night with its myriad of lights illuminating the crossing of the River Thames.* ***There are two main viewing locations, from Battersea Bridge and from the Riverside Walk near Ransome's Dock***.
> *Foreground: This is represented by the open water viewed from Battersea Bridge. Any additional in-channel development could affect the view of Albert Bridge.*
> *Middle Ground: Albert Bridge represents the focus of the view with its connections to the north and south banks of the River Thames. The frontage development to the river helps to frame the view of the bridge. The bridge is painted which enhances its visibility by day against the backcloth of buildings. The night time view is spectacular with the bridge illuminated by around 4000 bulbs to the cables and towers making it a striking landmark.*
> *Background: The filigree-like framework of the Cable Stayed bridge allows views through it which highlights its shape against the background. Any development within the channel or additional river crossings behind the bridge would compromise the view. The development of One Nine Elms (58 and 43 storeys) will appear to the right of the Vauxhall Tower, as well as the emerging proposals for the New Covent Garden Market site. The impact of any proposed pedestrian/cycle bridge across the River Thames beyond Chelsea Bridge on this view will need to be evaluated as and when a scheme comes forward*. (pp. 30-1)

The Reason for Inclusion of these 6 views is stated at the end of the views section, at para 3.2.2 that:

3.2.2 Reason for Inclusion

The designation is proposed to be included to support the implementation of policies LP1 The Design-Led approach; LP3 The Historic Environment; LP4 Tall and Mid-Rise Buildings. Although the Local Views were established through the Local Views SPD, they were not shown in the policies map. London Plan Policy HC3 (Strategic and Local Views) stipulates that clearly identifying local views in Local Plans and strategies enable the effective management of development in and around the views, and therefore it is proposed to include the Local Views in the policy map. (Tavernor underlining: pp. 36-7)

As the site of 1BB is not directly visible in any of these 6 views its impact on policies LP1 The Design-Led approach; LP3 The Historic Environment; LP4 Tall and Mid-Rise Buildings should therefore be assumed to be limited.

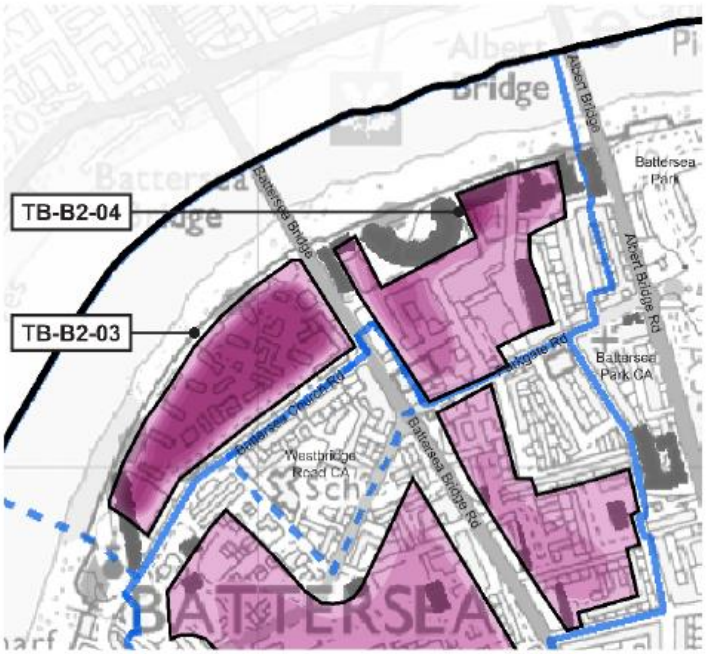
3.3 Tall Building zones

3.3.1 Definition

Buildings which are 7 storeys or over, or 21 metres or more from the ground level to the top of the building (whichever is lower) will be considered to be tall buildings. Tall building zones show locations where tall buildings will be an acceptable form of development and identify an appropriate height range for each zone.

Figure 36 (p. 40) maps out all the Battersea Tall Building Zones, and Fig. 43 (p. 44) focuses on the area immediately around 1BB, referred to as zone TB-B2-04, for which the appropriate height is proposed as 7-12 storeys (21-36m). The site of 1BB is not included in the shading for this zone.

TB-B2-03 and TB-B2-04



Existing prevailing height: 3-18 storeys

Appropriate height: 7-12 storeys (21-36m)

The Reason for Inclusion of these Tall Building zones maps is stated at para 3.32 that:

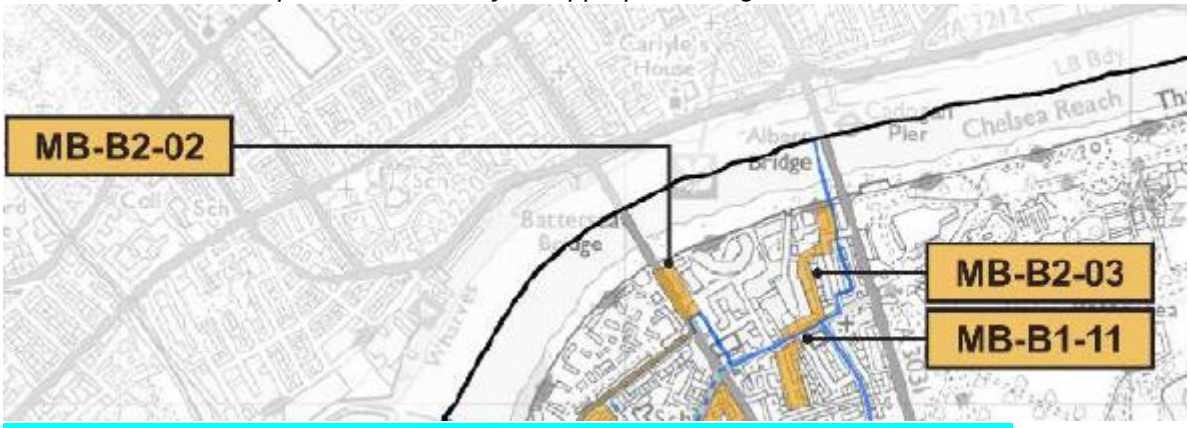
3.3.2 Reason for Inclusion

In accordance with Policy D9 of the London Plan, Development Plans should: (1) define what is considered a tall building; (2) define locations where tall buildings may be an appropriate form of development; and (3) define appropriate tall building heights for any such locations. The designation therefore seeks to address the requirements of the London Plan and support the implementation of Policy LP4 (Tall and Mid-rise Buildings).

3.4 Mid-rise Building zones

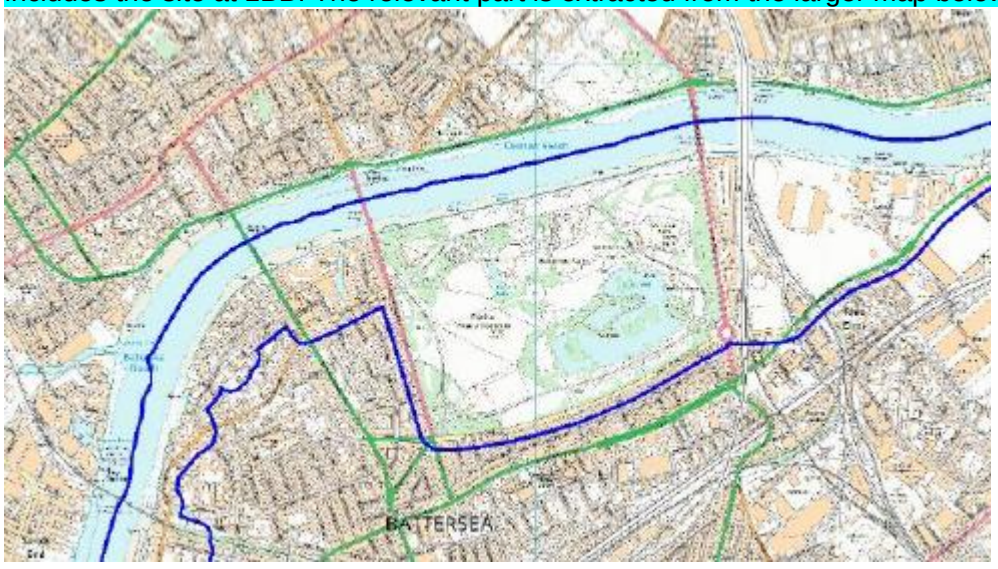
3.4.1 Definition

Buildings which do not trigger the definition of a tall building set out in Part A, but are 5 storeys or over, or 15 metres or more from the ground level to the top of the building (whichever is lower) will be considered to be mid-rise buildings. Mid-rise building zones show locations where mid-rise buildings will be an acceptable form of development and identify an appropriate height for each zone.



The extract of part of Figure 66 (p. 61), above, Battersea Mid-rise Building Zones, appears to identify the 1BB site as only appropriate for mid-rise building.

Figure 78 (p. 72) defines the Wandsworth Riverside Spatial Strategy Area, which includes the site at 1BB. The relevant part is extracted from the larger map below:



3.7.2 Reason for Inclusion

Each spatial area boundary identifies the area where the corresponding Placemaking Policies are expected to apply to. For several spatial areas they overlap with Overarching Spatial Area boundaries and for these all Placemaking Policies are to apply.

Appendix 3. R (London Borough of Hillingdon) v Mayor of London (2021)

Neutral Citation Number: [2021] EWHC 3387 (Admin)

Case No: CO/1683/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN	**Claimant**
on the application of	
LONDON BOROUGH OF HILLINGDON	
- and -	
MAYOR OF LONDON	**Defendant**
(1) INLAND LIMITED	**Interested Parties**
(2) CLOVE HOLDINGS LIMITED	
(3) MB HILLINGDON LIMITED	

- -
- -

Craig Howell Williams QC and Michael Brett (instructed by **Legal Services**) for the **Claimant**
Douglas Edwards QC and Isabella Tafur (instructed by **Transport for London Legal**) for the **Defendant**
Russell Harris QC (instructed by **Pinsent Masons LLP**) for the **First and Third Interested Parties**
The **Second Interested Party** did not appear and was not represented

Hearing dates: 23 & 24 November 2021

- -

Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of the decision made by the Defendant, on 30 March 2021, to grant planning permission for the construction of a mixed-used development, comprising buildings up to 11 storeys in height, at the site of the former Master Brewer Motel, Freezeland Way, Hillingdon UB10 9PQ ("the Site").

2. The Claimant is the local planning authority for the area in which the Site is situated. It identified that the development proposal was of potential strategic importance. On 19 February 2020, it resolved to refuse planning permission for the development. On 16 March 2020, the Defendant directed that he would act as the local planning authority, pursuant to section 2A of the Town and Country Planning Act 1990 ("TCPA 1990") and article 7 of the Town and Country Planning (Mayor of London) 2008 Order ("the 2008 Order").

3. The Third Interested Party ("IP3") is the owner of the Site and was the applicant for planning permission. The First Interested Party ("IP1") is a group company of IP3, and has the benefit of a legal charge against the Site. The Second Interested Party ("IP2") also has the benefit of a legal charge against the Site.

Grounds of challenge

4. The Claimant's grounds may be summarised as follows:

   i) The Defendant misinterpreted Policy D9 of the London Plan 2021 by concluding that, notwithstanding conflict with Part B of that policy, tall buildings were to be assessed for policy compliance against the criteria in Part C.

   ii) The Defendant erred in failing to take into account a material consideration, namely, the Claimant's submissions and accompanying expert evidence as to air quality.

   iii) The Defendant acted unlawfully and in a manner which was procedurally unfair in that he failed to formally re-consult the Claimant or hold a hearing, prior to his re-determination of the application, following the adoption of the London Plan 2021.

Planning history

5. The Site comprises an area of some 2.48ha which formerly accommodated a public house/motel which has been demolished. It lies at the junction of Freezeland Way (which bounds the Site to the south) and Long Lane (which bounds the Site to the west), whilst the A40 forms the northern boundary of the Site. A parcel of Metropolitan Green Belt abuts the Site to the east. On the southern side of Freezeland Way and south of the junction lies the Hillingdon local centre, characterised by two storey residential and two/three storey retail premises.

6. The Site forms part of site allocation Policy SA14 in the London Borough of Hillingdon Local Plan: Part 2 - Site Allocations and Designations (2020) ("LP Allocations").

7. The Site lies within an Air Quality Management Area declared by the Claimant in September 2003. It also falls within an air quality focus area ("AQFA"), the A4/Long Lane AQFA. AQFAs are locations that exceed the UK National Air Quality Strategy objectives and EU annual mean limit value for nitrogen dioxide ("NO2"). They are also locations with high human exposure.

Application for planning permission

8. On 10 October 2019 IP3 made an application for planning permission in the following terms:

> "Construction of a residential-led, mixed-use development comprising buildings of between 2 and 11 storeys containing 514 units (Use Class C2); flexible commercial units (Use Class A1/A1/A3/D1); associated car (165 spaces) and cycle parking spaces; refuse and bicycle stores; hard and soft landscaping including a new central space, greenspaces, new pedestrian links; biodiversity enhancement; associated highways infrastructure; plant; and other associated development".

9. In support of the application, reports were submitted by Create Consulting ("Create") on air quality issues, dated September 2019 and October 2019.

10. Given the scale of the proposed development, the application was referred by the Claimant to the Defendant under article 4 of the 2008 Order. The Defendant provided a response under article 4(2) of the 2008 Order on 2 December 2019 ("Stage 1 Report") which *inter alia* made clear that improving air quality was a "core priority" for the Defendant, particularly in AQFAs. Given the proximity of the Site to the A40, the Site was said to be constrained in air quality terms and the Claimant was instructed to "secure appropriate air quality mitigation measures as part of any future planning permission".

Claimant's consideration of Application

11. The Claimant's officers prepared a report ("the OR") to advise its Major Applications Committee, recommending that the application be refused. The OR considered that, although the principle of a residential-led development was acceptable on the Site, the application conflicted with a number of development plan policies, did not accord with the statutory development plan taken as a whole and ought not to be approved.

12. The statutory development plan at that time consisted of the "London Borough of Hillingdon Local Plan Part One – Strategic Policies" (November 2012) ("LP Part 1"); LP Allocations; "London Borough of Hillingdon Local Plan: Part 2 – Development Management Policies" (2020) ("LP DMP") and the London Plan (2016).

13. The Defendant had also published an "Intend to Publish" ("ITP") version of the draft London Plan on 19 December 2019.

14. The OR proposed eight reasons for refusal, of which the following are most relevant:

> "1. Non Standard reason for refusal Design
>
> The development, by virtue of its overall scale, bulk of built development and associated infrastructure works, height, density, site coverage and lack of landscaping and screening, is considered to constitute an over-development of the site, resulting in an unduly intrusive, visually prominent and incongruous form of development, which would fail to respect the established character of the North Hillingdon Local Centre or compliment the visual amenities of the street scene and openness and visual amenity of the Green Belt, the wider open context and would mar the skyline, contrary to Policies BE1 and EM2 of the Hillingdon Local Plan: Part One - Strategic Policies (Nov 2012), Policies DMHB 10, DMHB 11, DMHB 12, DMHB 14, DMHB 17, DMEI 6 of the Local Plan: Part 2 - Development Management Policies (2020); Policy SA 14 (Master Brewer and Hillingdon Circus) of the Local Plan: Part Two - Site Allocations and Designations (2020), Policies 7.4, 7.6, 7.7 of the London Plan (2016), Policies D1, D3, D4, D8 and D9 of the London Plan (Intend to Publish version 2019) and the NPPF (2019).
>
> …..
>
> 5. Non Standard reason for refusal Air Quality
>
> The submitted Air Quality Assessments have failed to provide sufficient information regarding Air Quality, moreover the information submitted is not deemed to demonstrate the proposals are air quality neutral and given that the site is within an Air Quality Focus Area, the development could add to current exceedances in this focus area. The development is contrary to Policy DMEI 14 (Air quality) of the Local Plan: Part 2 - Development Management Polices (2020), Policy EM8 of the Local Plan Part 1 (2012), Policy 7.14 (Improving Air Quality) of the London Plan (2016), Policy SI 1 of the draft London Plan - Intend to Publish (December 2019) and the NPPF (February 2019)."

15. Whilst the surrounding area is dominated by two-three storey buildings, the tallest element of the proposed development stands at eleven storeys. LP DMP paragraph 5.32 identifies that "high buildings and structures" are those that "are substantially taller than their surroundings, causing a significant change to the skyline". Policy DMHB 10 applies to proposals for such buildings. The policy provides in particular that:

> "Any proposal for a high building or structure will be required to respond to the local context and satisfy the criteria listed below.
>
> It should:

> i) be located in Uxbridge or Hayes town centres or an area identified by the Borough as appropriate for such buildings;
>
> ii) be located in an area of high public transport accessibility and be fully accessible for all users; [and]
>
> iii) be of a height, form, massing and footprint proportionate to its location and sensitive to adjacent buildings and the wider townscape context. Consideration should be given to its integration with the local street network, its relationship with public and private open spaces and its impact on local views;"

16. Policy DMHB 10 built, as a development management policy, on the strategic-level policy in Policy BE1 paragraph 11 of LP Part 1. This required that:

> "Appropriate locations for tall buildings will be defined on a Character Study and may include parts of Uxbridge and Hayes subject to considering the Obstacle Limitation Surfaces for Heathrow Airport. Outside of Uxbridge and Hayes town centres, tall buildings will not be supported. The height of all buildings should be based upon an understanding of the local character and be appropriate to the positive qualities of the surrounding townscape."

17. In accordance with Policy BE1 LP Part 1, the Claimant undertook a detailed townscape character assessment which formed the evidential basis for Policy DMHB 10 LP DMP and its identification of Hayes and Uxbridge town centres as "appropriate for tall buildings". The Claimant has not identified any other such area.

18. The OR assessed the development against these development plan policies and identified that it was in conflict with them in that the tall buildings:

> "would not be located in Uxbridge or Hayes town centres or an area identified by the Borough as appropriate for a high building and would be located in an area with a low PTAL (Level 2-3) and would also be of a height, form, massing and footprint which is considered to be out of proportion to its location, adjacent buildings and the wider townscape context."

19. Officers therefore advised that allowing tall buildings in this location would be contrary to this policy, and also to London Plan 2016 Policy 7.7 and ITP draft London Plan Policy D9.

20. In respect of air quality, the OR referred to the advice of the Claimant's air quality consultee, and accepted its recommendations that IP3 had not demonstrated that the development would be air quality neutral; that the existing exceedances in the AQFA would not be worsened; and that proposed mitigation would in fact reduce emissions nor to what extent. The report concluded that the development would be contrary to LP DMP Policy DMEI 14.

21. The Committee considered the application at a meeting on 19 February 2020. The recommendation of the OR was unanimously agreed. The minutes of the meeting recorded a further offer from IP3 to undertake air quality "mitigation in terms of damages contribution", and stated:

> "The Committee supported the officer's recommendation and welcomed refusal reason given on air quality. It was emphasised that air quality could not be compromised. Concerns were raised regarding the size of the development, air pollution, and, overall, Members considered that the application was out of character with the local area."

22. The Claimant therefore resolved to refer the application to the Defendant, under Article 5 of the 2008 Order, with a statement that it proposed to refuse to grant planning permission.

Defendant's consideration of the application

23. The Defendant in a letter dated 16 March 2020, accompanied by a report, ("Stage 2 Report") gave a direction under article 5(1)(b)(i) of the 2008 Order that he would act as local planning authority and determine the application.

24. After the Defendant took over the determination of the application, IP3 made some amendments to the application, and provided further material, in particular, further reports from Create dated April 2020 and June 2020. A Transport Assessment dated July 2020 was also produced.

25. Prior to the hearing, officers of the Greater London Authority ("GLA") produced a report advising the Defendant to grant the application ("the Hearing Report").

26. The Hearing Report began with a "Recommendation Summary" in which the Defendant was invited to grant conditional planning permission for the application for the reasons set out in the "reasons for approval" section of the report. The "reasons for approval" section of the Hearing Report set out in summary form why officers had concluded that the proposal was considered to be acceptable in planning terms and to accord with the development plan (paragraph 2(ix)).

27. On the issue of tall buildings policy, the reason for approval at paragraph 2(iii) stated "the tall buildings are acceptable despite not meeting the locational requirements of policy." It went on to find that the application generally accords with London Plan Policy 7.7, ITP draft London Plan Policy D9 (partial conflict owing to tall building location) and LP DMP Policy DMHB10 (partial conflict owing to tall building location).

28. The Hearing Report considered Policy 7.7 London Plan 2016, which provided:

> "B Applications for tall or large buildings should include an urban design analysis that demonstrates the proposal is part of a strategy that will meet the criteria below. This is particularly

> important if the site is not identified as a location for tall or large buildings in the borough's LDF.
>
> C Tall and large buildings should:
>
> a generally be limited to sites in the Central Activity Zone, opportunity areas, areas of intensification or town centres that have good access to public transport
>
> b only be considered in areas whose character would not be affected adversely by the scale, mass or bulk of a tall or large building…"

29. At paragraph 218, the Hearing Report stated:

> "GLA officers recognise that the proposed tall buildings are not in a location where they are supported in principle by Local Plan Policy DMHB 10 and that this is a policy conflict with parts (i) and (ii) of that policy, which state that tall buildings should be located within Uxbridge and Hayes town centres and areas of high public transport accessibility respectively. This is addressed in the 'planning balance' section of this report. They do however comply with the locational requirements of London Plan Policy 7.7, being in a town centre with good access to public transport … The principle of tall buildings in this location would also conflict with the locational component of Intend to Publish London Plan Policy D9 (Part B), which states that Local Plans should identify suitable locations for tall buildings. This does not form part of the statutory development plan but is a material consideration in the determination of this application."

30. At paragraph 230, the Hearing Report assessed the other criteria in Policy DMHB 10; and at paragraph 231 addressed the relevant criteria in Policy 7.7 London Plan 2016 and Policy D9 ITP London Plan.

31. At paragraph 233, the Hearing Report concluded in respect of urban design that:

> "In conclusion, the scheme is considered to be in conflict with part of Local Plan Policy DMHB 10 and Intend to Publish London Plan Policy D9 in respect of the principle of tall buildings in this location. This is addressed in the 'planning balance' section of this report. The proposal is otherwise considered to be compliant with the requirements of the London Plan Policy 7.7, Policies D9 […] of the Mayor's Intend to Publish London Plan …."

32. In respect of air quality issues, the reason for approval at paragraph 2(iv) stated that:

> "Residents and users of the scheme would be sufficiently protected from air quality impacts arising from surrounding roads… The applicant's Air Quality Assessment has been

> reviewed by GLA officers and is supported. The development would be air quality neutral, subject to the mitigation measures secured…"

33. The reasoning underpinning this reason for approval was set out at paragraphs 206-213 of the Hearing Report. At paragraph 210, the Hearing Report reported IP3's evidence that:

> "In terms of impact on future residents of the development, the Air Quality Assessment demonstrates that the only exceedance of the Air Quality Objective (AQO) limit for nitrogen dioxide is at the outer boundary of the site (40.52ug/m3), whilst at the nearest residential receptor it would be 35.25ug/m3. For particulate matter PM10, this would be an annual mean of 16.73-18.68ug/m3, so also within AQO limits. As such the Air Quality Assessment concludes that the air quality conditions do not constrain residential development and doesn't recommend mitigation."

34. At paragraph 211, the Hearing Report stated:

> "The GLA's air quality experts have confirmed that any potential adverse impact would be limited to one receptor on Long Lane north of the A40. The possible slight adverse impact is unlikely and any possible impact would not be significant. Overall the air quality impacts of the proposed development would not impact on the integrity of the Air Quality Focus Area."

35. Under the heading "Conclusion and planning balance", the Hearing Report concluded, at paragraphs 362-370, that the development was in accordance with the development plan. It identified two development plan policies "that are not fully complied with" (DMHB 10 and DMHB 18 LP DMP) but concluded that "overall, the proposal accords" with the development plan. It said:

> "a conflict with two development plan policies does not necessarily mean that there is an overall conflict with the development plan as a whole as development plan policies can pull in different directions. GLA officers have considered the whole of the development plan and consider that, overall, the proposal accords with it. This report sets out all relevant material considerations, none of which, individually or cumulatively, are considered to warrant refusal of planning permission"

The material considerations considered in the report included the conflict with policy D9 of the ITP London Plan.

36. The Claimant responded to the Hearing Report, and the issues it raised, in written representations, dated 28 August 2020. These maintained that the analysis set out in the OR was correct. At the same time as submitting the written representations, the Claimant provided the Defendant with an "Air Quality Assessment Peer Review Report" prepared by Air Quality Experts Global Ltd ("the AQE Report"), dated August

2020, in support of the Claimant's contentions that the development was still unacceptable in air quality terms.

37. The AQE Report found a number of significant problems with Create's additional air quality evidence, for example, that it:

    i) underestimated the baseline vehicle movements near the Site (paragraph 3.2.5);

    ii) failed properly to identify worst case receptors for exposure to emissions within the Site and along Hercies Road (paragraph 3.3.1), and along Long Lane South and Western Avenue (paragraph 3.3.5);

    iii) failed to report on new residents' exposure levels, excluding totally new receptors within the Site (paragraph 3.5.4) and that if this had been done, it would show that emissions concentration on the site for future residents would be unacceptably high in worst-case locations (paragraphs 3.5.5-3.5.6);

    iv) failed to differentiate between traffic emissions generated by residential uses and flexible retail (B1 and A1) uses on the Site. When this is done it is clear that the traffic emissions from B1 uses on the site are not neutral, and require mitigation measures (paragraphs 3.6.1-3.6.8).

38. The Defendant's officers then produced an Addendum Report, dated 3 September 2020 on the day of the hearing, which noted:

> "In addition to this the Council has provided a technical response on air quality produced by AQE Global (August 2020). It should be noted that the Council has requested (should the GLA be minded to approve the scheme) a contribution of £218,139 to be paid to Hillingdon to deliver its air quality local action plan and or implement specific measures on/along the road network affected by the proposals that reduce vehicle emissions and or reduce human exposure to pollution levels. GLA officers note that this contribution has not been agreed and is subject to further discussion."

39. The Addendum Hearing Report did not address the substance of the criticisms in the AQE Report.

40. The Defendant held the representation hearing on 3 September 2020. A transcript of the hearing has been provided.

41. At the hearing, GLA officers explained that the application site was within an air quality focus area; that the Claimant's draft decision included a reason related to air quality; that IP1 and 3 had worked closely with GLA officers since then to provide additional information and clarification regarding air quality impacts; that residential units and play spaces had been positioned to minimise exposure to poor air quality; that exceedances in the air quality objective limit for NO2 were at the outer boundary of the site and that there would be no exceedances in respect of particulate matter.

42. Mr James Rodger, Deputy Director of Planning and Regeneration, appeared on behalf of the Claimant and made oral representations. He objected to the height of the proposed development, which he contended was contrary to Policy DMHB 10. He indicated that a section 106 contribution towards air quality mitigation was still required. A number of residents and local residents' associations made representations to the Defendant at the hearing raising concerns about *inter alia* air quality and the scale of the development.

43. At the end of the hearing, the Defendant announced that he accepted the officers' recommendation to grant planning permission. He said:

> "…. Can I begin by thanking everyone who has attended today and for the contributions made in particular by the local residents, the objectors, the applicant and the council? This has ensured that I am as informed as possible to make this decision.
>
> I will begin by explaining the wider context to my consideration, which is that London is facing a housing crisis and we urgently need more housing. Particularly, genuinely affordable homes. Assessed need showed that London needs at least 66,000 new homes a year until 2030, 3,000 of which must be affordable in order to address the existing shortfall in housing and accommodate London's projected population growth.
>
> I have made fixing the housing crisis one of my top priorities and achieving this is dependent on the approval of well-designed schemes with good levels of low-cost rented and other genuinely affordable housing. This needs to be understood not just by the government, but at local council level too. We must all ensure that we use appropriate opportunities that are available to us to build more affordable housing, particularly lower-cost rental housing.
>
> Based on the latest figures from the London Development Database, Hillingdon Borough still has a long way to go to deliver the affordable housing targets as set out in the London Plan. The scheme that I am considering would provide 121 new London affordable rent homes and 61 shared ownership homes to people who desperately need them in Hillingdon, all of which would be genuinely affordable.
>
> This site is an under-utilised area of brownfield land, close to a London Underground station. It is exactly the kind of site we need to intensify if we are to deliver the homes Londoners need whilst protecting the Green Belt. The council's own policy allocates this site for residential development.
>
> As was clear to me during my site visit, the site is relatively isolated from its surroundings. The plans offer new public routes through the site, connecting to the [area] and significant areas of new and improved green space, which would be of considerable

> benefit to local people. It would also provide new commercial uses and improve connections, which would benefit the local centre.
>
> I have carefully considered the visual impact of the development. I agree with the GAL [*sic*] and council officers that there would be less than substantial harm to heritage assets, which would be out-weighed by the benefits of the scheme.
>
> Whilst the scale and prominence would be apparent in some local views, this would not in my view be a harmful impact given the approach the massing and high-quality architecture, and would not harm the visual openness of the surrounding Green Belt. I recognise that the site is not within a location designated to tall buildings. But overall, I consider the height and massing to be acceptable.
>
> Air quality is of course a very important issue for me. I have carefully considered the technical evidence made available to me and my view is that the barrier block form of development will ensure that future residents will not be disadvantaged, subject to the mitigation measures recommended.
>
> Overall, the scheme will provide high-quality housing and external amenity, despite the shortfall against local policy. I have heard the concerns raised about the lack of car parking and the increase in traffic congestion. In my view, when considering development proposals, the main way to reduce congestion is to discourage the use of the private car.
>
> Approving well-designed, car-light developments in accessible locations like this is one of the ways to achieve this objective. As well of course as other objectives around environment and health, I am satisfied that there are adequate measures secured to mitigate overspill car parking.
>
> For these reasons I agree with the GLA planning Officer's recommendation and grant planning permission. Can I thank you all very much for your time this afternoon and today? Thank you. Stay safe."

44. In October 2020, Create sent to the Defendant a report responding to the comments and criticisms made by AQE in its report of 28 August 2020. This report was not sent to the Claimant.

Post-hearing developments in planning policy

45. On 10 December 2020, the Secretary of State for Housing, Communities and Local Government issued a set of directions, under section 337 of the Greater London

Authority Act 1999, requiring amendments to the ITP London Plan and in particular to Policy D9.

46. The Secretary of State's covering letter, dated 10 December 2020, said as follows:

> "….. I am issuing a new Direction regarding Policy D9 (Tall Buildings). There is clearly a place for tall buildings in London, especially where there are existing clusters. However, there are some areas where tall buildings don't reflect the local character. I believe boroughs should be empowered to choose where tall buildings are built within their communities. Your draft policy goes some way to dealing with this concern. In my view we should go further and I am issuing a further Direction to strengthen the policy to ensure such developments are only brought forward in appropriate and clearly defined areas, as determined by the boroughs whilst still enabling gentle density across London. I am sure that you share my concern about such proposals and will make the required change which will ensure tall buildings do not come forward in inappropriate areas of the capital."

47. DR12 set out a "Direction Overview" as follows:

> "The draft London Plan includes a policy for tall buildings but this could allow isolated tall buildings outside designated areas for tall buildings and could enable boroughs to define tall buildings as lower than 7 storeys, thus thwarting proposals for gentle density.
>
> This Direction is designed to ensure that there is clear policy against tall buildings outside any areas that boroughs determine are appropriate for tall buildings, whilst ensuring that the concept of gentle density is embodied London wide.
>
> It retains the key role for boroughs to determine where may be appropriate for tall buildings and what the definition of tall buildings are, so that it is suitable for that Borough."

48. The 'statement of reasons' for DR12 stated *inter alia*:

> "……The modification to policy D9 provides clear justification to avoid forms of development which are often considered to be out of character, whilst encouraging gentle density across London."

49. Further to these directions, the Defendant published a further version of the draft London Plan, the 'Publication London Plan' on 21 December 2020 incorporating the amendments to Policy D9, which in consequence read as follows:

> "Definition

> A Based on local context, Development Plans should define what is considered a tall building for specific localities, the height of which will vary between and within different parts of London but should not be less than 6 storeys or 18 metres measured from ground to the floor level of the uppermost storey.
>
> Locations
>
> B
>
> 1) Boroughs should determine if there are locations where tall buildings may be an appropriate form of development, subject to meeting the other requirements of the Plan. This process should include engagement with neighbouring boroughs that may be affected by tall building developments in identified locations.
>
> 2) Any such locations and appropriate tall building heights should be identified on maps in Development Plans.
>
> 3) Tall buildings should only be developed in locations that are identified as suitable in Development Plans.
>
> Impacts
>
> C Development proposals should address the following impacts:
>
> 1) visual impacts […]
>
> 2) functional impact […]
>
> 3) environmental impact […]"

50. The text underlined above was added pursuant to the Secretary of State's direction, DR12.

51. On 2 March 2021, the London Plan 2021 was adopted and published as the spatial development strategy for London, replacing the London Plan 2016 and it became part of the statutory development plan for the application.

Reconsideration of Application

52. In the light of these significant changes in relevant planning policy, the Claimant wrote to the Defendant on 26 February 2021 and 4 March 2021, requesting that he reconsider the application.

53. On 5 March 2021, the Defendant wrote to the Claimant confirming that he intended to reconsider the application in the light of the changes in the policy "and any representations received" since the hearing.

54. On 9 March 2021, the Claimant wrote to the Defendant requesting him to hold a further representation hearing. By a letter dated 23 March 2021, the Defendant declined to hold

a further hearing, and stated that the application would be redetermined on an unspecified date on or after 29 March 2021. In the light of this indication, the Claimant's officers hurried to put together urgent representations to submit to the Defendant, which were submitted under cover of a letter from the Claimant dated 26 March 2021.

55. No further reports or recommendations were published by the GLA officers, meaning that the Claimant could not comment on the approach proposed by them.

56. The application was reconsidered and redetermined on 29 March 2021, and the planning permission was issued on 30 March 2021. The permission decision was published on the Defendant's website alongside two further reports from the GLA officers: an "Update Report" dated 29 March 2021 and an "Update Report Addendum"

57. In respect of tall buildings policy, the Update Report identified that Policy D9 of the London Plan 2021 should now be given full statutory weight (paragraph 21) and that the Secretary of State's direction "primarily sought to ensure that tall buildings are only brought forward in appropriate and clearly defined areas as determined by the boroughs" (paragraph 13). It went on to identify that as a consequence "there is now a further element of conflict with the development plan in that the scheme does not fully accord with new London Plan Policy D9". Nevertheless, the Update Report gave significant weight to the fact that the proposals would however comply with the other criteria in Policy D9 (paragraphs 16 and 22). It advised that a conflict with some development plan policies does not necessarily mean that there is an overall conflict with the development plan as a whole, as policies can pull in different directions (paragraph 17). The Update Report identified additional conflicts with the London Plan and Local Plan policies in respect of heritage, but concluded that the less than substantial harm was outweighed by the public benefits of the development. At paragraph 23, the Update Report concluded that "overall, the proposal accords" with the development plan. None of the material considerations, as set out in the Hearing Report and the Update Report, warranted refusal of planning permission.

58. The Update Report said at paragraph 24:

> "The scheme provides a high standard of residential accommodation …. The new public spaces and routes would be of high quality. Given the circumstances of this site, the scale and massing is considered acceptable within this accessible local centre, marks the location of the station and would have an acceptable visual impact."

59. The Claimant's further evidence on air quality was not mentioned in the Update Report, but it was briefly addressed in the Update Report Addendum. It noted the receipt of the Urgent Representation and the AQE Report and commented as follows:

> "….the Council raises concerns that its Air Quality Peer Review was not considered by GLA officers because it is not mentioned in the Representation Hearing Report. This is because this information was submitted to the GLA by the Council on 28 August 2020 along with its pre-hearing representation, more than one working day after the Representation Hearing Report

> was published. The Council's pre-hearing representation and Air Quality Peer Review was addressed in the addendum report published on the day of the hearing.
>
> GLA officers consider the application to be in accordance with planning policy regarding air quality and as such the 'damage cost' payment requested by the Council is not justified…."

Legal framework

Judicial review

60. In a claim for judicial review, the Claimant must establish a public law error on the part of the decision-maker. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. A legal challenge is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin).

The development plan and material considerations

61. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

62. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters….
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission….. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should

be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted….

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will

> have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

63. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17] (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed).

64. Lord Reed rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. He said, at [18], that development plans should be "interpreted objectively in accordance with the language used, read in its proper context". They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.

65. Lord Reed re-affirmed well-established principles on the requirement for the planning authority to make an exercise of judgment, particularly where planning policies are in conflict, saying at [19]:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)."

66. In *BDW Trading Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 493, Lindblom LJ summarised the principles to be applied, at [20]-[21]:

> "20. Without seeking to be exhaustive, I think there are five things one can fairly say in the light of the authorities.
>
> 21. First, the section 38(6) duty is a duty to make a decision (or "determination") by giving the development plan priority, but

> weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde's speech in *City of Edinburgh Council*, at p.1458D to p.1459A, and p.1459D-G). Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull in different directions (see Lord Clyde's speech in City of Edinburgh Council , at p.1459D-F, the judgments of Lord Reed and Lord Hope in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, respectively at paragraphs 19 and 34, and the judgment of Sullivan J., as he then was, in *R. v Rochdale Metropolitan Borough Council, ex p. Milne* [2001] J.P.L. 470, at paragraphs 48 to 50). Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides "whether the development plan should or should not be accorded its statutory priority", and secondly, "if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration" (see Lord Clyde's speech in City of Edinburgh Council , at p.1459H to p.1460D). Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole (see the judgment of Richards L.J. in *R. (on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, at paragraph 28, and the judgment of Patterson J. in *Tiviot Way Investments Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) at paragraphs 27 to 36). And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance (see the judgment of Richards L.J. in *Hampton Bishop Parish Council*, at paragraph 30)."

67. In *Gladman v Canterbury City Council v Secretary of State* [2019] EWCA Civ 669, Lindblom LJ set out the general principles to be applied at [21], and added at [22]:

> "22 If the relevant policies of the plan have been properly understood in the making of the decision, the application of those policies is a matter for the decision-maker, whose reasonable exercise of planning judgment on the relevant considerations the court will not disturb: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1005] 1 WLR 759, 780. The interpretation of development plan policy,

> however, is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to discern from the language used in formulating the plan the sensible meaning of the policies in question, in their full context, and thus their true effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text. The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making, in the public interest (see the judgment of Lord Reed in *Tesco v Dundee City Council*, at paragraphs 18 and 19; the judgment of Lord Gill in *Hopkins Homes*, at paragraphs 72 and 73; the judgment of Richards L.J. in *Ashburton Trading Ltd. v Secretary of State for Communities and Local Government* [2014] EWCA Civ 378, at paragraphs 17 and 24; and the judgment of Richards L.J. in *R. (on the application of Cherkley Campaign Ltd.) v Mole Valley District Council* [2014] EWCA Civ 567, at paragraphs 16 and 21)."

68. The requirement to take into account material considerations was recently reviewed by the Supreme Court in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52, in the judgment of the Court delivered jointly by Lord Hodge and Lord Sales:

> "116. … A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:
>
> > "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."
>
> 117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock)."

69. The duties under section 38(6) TCPA 1990 and section 70 PCPA 2004 continue to bind a decision maker right up until the issuance of a notice granting planning permission. In *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370; [2003] 1 P & CR 19, Jonathan Parker LJ held:

"122. In my judgment, an authority's duty to "have regard to" material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind — albeit that the application was not specifically placed before it for reconsideration.

123. The matter cannot be left there, however, since it is necessary to consider what is the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice.

124. At one extreme, it cannot be a sensible interpretation of section 70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated* , prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could* not have regard prior to the issue of the decision notice.

125. On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not might reach) the same decision."

Planning officers' reports

70. In light of the Claimant's criticisms of the GLA officers' reports, I have reminded myself of the principles to be applied, as summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42]:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's

> decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

71. The level of detail to be expected in officer reports was considered by Sullivan J. *in R v Mendip DC ex parte Fabre* [2017] PTSR 1112, at 1120B:

> "Whilst planning officers' reports should not be equated with inspectors' decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much

> information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail."

Ground 1

72. Ground 1 turned on the interpretation of Policy D9 in the London Plan 2021.

Claimant's submission

73. The Claimant submitted that the ordinary meaning of the words in Policy D9, read as a whole, in the light of its context and objectives, sets out a clear process for the grant of planning permission for tall buildings. It gives primacy to the planning judgment of the local planning authority at the plan-making stage in terms of the definition and location of tall buildings, and does not permit the Defendant to claim any policy support for overriding that judgment when determining an application for planning permission.

74. Mr Howell Williams QC said, at paragraphs 37 to 42 of his skeleton argument:

> "37. Turning then to the wording of Policy D9 [SB/E1], the following is apparent:
>
> a. Policy D9 Part A states that the definition of "what is considered a tall building for specific localities" is a matter for individual boroughs through their local development plan. The only limit on that planning judgment is that the definition of a tall building is subject to a "floor" of 6 storeys or 18 metres. When arriving at this definition, it is implicit that a borough planning authority will need to consider the potential impacts of buildings of different heights in specific localities: that this is the case is supported by paragraph 3.9.3 in the supporting text [CB/E5] which elucidates what is meant by buildings being "tall" by reference to their relative height compared to "their surroundings" and their impact on the skyline.
>
> b. Policy D9 Part B, paragraph 1 is linked to Part A in so far as in addition to determining what a tall building is in planning policy terms, boroughs are given the sole responsibility for determining "if there are locations where tall buildings may be an appropriate form of development" within their area i.e. in specific localities. Boroughs are not obliged to identify any such locations, nor is there a presumption that at least one area of a borough will be appropriate. The matter is left entirely to the planning judgment of the borough through the development plan process. Moreover, even in areas identified, there is no presumption that tall buildings will be consented, because, as paragraph 3.9.3 explains (building on Policy D9 Part B paragraph 1) "such proposals will still need

to be assessed in the context of other planning policies… to ensure that they are appropriate for their location and do not lead to unacceptable impacts".

c. When deciding whether and where tall buildings "may be an appropriate form of development", boroughs will necessarily have to take into account the impacts of buildings of defined heights or features. This is obviously implicit in the word "appropriate" (referring to the appropriateness of the form of development given the particular characteristic of the locality) and "suitable" (in Policy D9 Part B paragraph 3, referring to the suitability of a particular locality *for tall buildings* given its particular characteristics and the impact of tall building on them). The supporting text at paragraph 3.9.2(1) supports this interpretation (that boroughs necessarily have to take into account impacts of potential development) since it instructs boroughs to identify locations "by assessing potential visual and cumulative impacts". That impact assessment is intrinsic to appropriateness is also reflected in paragraph 3.9.1 of the supporting text, which recognises that tall buildings can "have detrimental visual, functional and environmental impacts <u>if in inappropriate locations</u>" (underlining added).

d. Policy D9 Part B paragraph 3 then gives force and meaning to the judgments reached by boroughs under Part A and Part B paragraph 1, by stating in clear terms that tall buildings (as defined in Part A) "should only be developed in locations that are identified as suitable in Development Plans" by boroughs under Part B. In this case it is not in dispute that the only areas identified as suitable for tall buildings in Policy DMHB10 LP DMP are Uxbridge and Hayes town centres, which identification was justified by a Townscape Character Study evidence base…..

e. Policy D9 Part C …. then requires "development proposals" to satisfactorily address a number of stipulated impacts, grouped into categories (visual, functional, environmental, and cumulative). Some of these impacts are familiar because they include some (visual and cumulative) that boroughs will have already had regard to when determining the heights/localities appropriateness/suitability question. The term "development proposals" does not mean *any* development proposal of *any* type: it has to be read in the context of Policy D9 as a whole, and thus logically in line with Parts A and B which precede it, and the assessment process at local plan level that is contemplated by those two parts (and explained further in the supporting text). Thus the "development proposals" which must address the stipulated impacts can only be understood to mean development

proposals (i) for tall buildings as defined by boroughs under Part A (as explained in paragraph 3.9.3, "this policy applies to tall buildings as defined by the borough"….; and (ii) in locations identified as suitable by boroughs under Part B. Part C of the process for tall building regulation in London requires further examination of the detail of particular proposals that have come forward in compliance with Parts A and B: this is (amongst other things) what paragraph 3.9.3 of the supporting text is referring to when it speaks of "such proposals [i.e. proposals in areas identified as suitable] will still need to be assessed in the context of other planning policies… to ensure that they are appropriate for their location and do not lead to unacceptable impacts".

f. There is nothing in the wording or in the supporting text which suggests that the detailed criteria in Policy D9 Part C is to be used to assess the policy compliance of a development proposal that is not a tall building or not in a location identified as suitable. There is nothing that suggests that, through consideration of these "impacts", a decision-maker is entitled to reopen a borough's planning judgment on definition/applicability of the policy and or location.

g. Finally, Policy D9 Part D, which requires the incorporation into tall buildings of publicly-accessible space "if appropriate" naturally applies to tall buildings as defined in Policy Part A, in locations identified in accordance with Part B, and which are acceptable in terms of the criteria set out in Part C. It could not sensibly be suggested that the provision of publicly-accessible space so as to engage Part D could make a development in breach of Parts B and C compliant with Policy D9 taken as a whole.

38. That this is the correct interpretation to give to Policy D9, and in particular to the role of Part C within it, is strongly reinforced having regard to the policy's "full context" and the "objectives to which the policies are directed", as required by Gladman.

39. In terms of the objectives to which the policy is directed, these are clear from the wording of the policy: (i) to ensure that boroughs have responsibility for the definition and location of tall buildings within their area; (ii) that tall buildings should only be constructed in areas which boroughs identify as suitable; and (iii) that even in those areas, tall buildings should satisfactorily address their increased potential adverse planning impacts.

40. The wording of Policy D9 is noticeably different from its predecessor in the London Plan 2016, Policy 7.7….., under which the Application was initially assessed in the Hearing Report. That policy did not provide any wording to compare with

> the "Definition" and "Locations" parts of Policy D9 and the allocation of responsibility to local planning authorities in those regards but, under the then heading "Planning decisions", set out a list of criteria in paragraph B and C which applications should meet, which was said to be "particularly important if the site is not identified as a location for tall or large buildings" in the borough development plan. At least two of those criteria, (a) and (b), relate to location. Policy D9 is different, and obviously so – in its wording and in its objectives.
>
> 41. Should any further support be required for these new and different objectives, however, the Court can have regard as part of the full context to the Secretary of State's Direction ….. as did D at Update Report paragraph 13…. DR12 required changes to the wording of D9 "to strengthen the policy to ensure such developments are only brought forward in appropriate and clearly defined areas, as determined by boroughs" ….. and "to ensure that there is a clear policy against tall buildings outside any areas that boroughs determine are appropriate for tall buildings" …..
>
> 42. C's interpretation of Policy D9 as set out above is the only reading which can properly give effect to these objectives: if a development to which the policy applies under Part A is not in a suitable location defined in accordance with Part B, Part C is not relevant to the question of compliance with Policy D9 by virtue of the mandatory wording of Part B paragraph 3, which cannot be ignored."

75. The Claimant then went on to submit that the Defendant erred in law when, after accepting that the proposed development was not in a location identified as suitable by the Claimant, he nonetheless proceeded to assess the proposal against the detailed criteria in Part C, and gave weight to "partial compliance" with Policy D9 in the planning balance.

Conclusions

76. It was common ground that the interpretation of Policy D9 was a question of law for the Court, and that a development plan policy should be interpreted objectively, in accordance with the natural and ordinary meaning of the words used, in the light of its context and objectives. It should not be interpreted as if it was a contract or statutory provision.

77. In *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, Lord Hodge (giving the judgment of the Supreme Court) set out the principles applicable to the use of extrinsic material when interpreting documents. He said:

> "33. ……There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent: *R v Ashford*

> *Borough Council, Ex p Shepway District Council [1999] PLCR 12*, per Keene J at pp 19C–20B; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions [2003] JPL 1048*, per Buxton LJ at para 13 and Arden LJ at para 27. It is also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability. In section 36(6) of the 1989 Act the construction of a generating station otherwise than in accordance with the consent is a criminal offence. This calls for clarity and precision in the drafting of conditions.
>
> 34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

78. I was referred to the judgment of Lindblom J. (as he then was) in *R (Phides Estates (Overseas) Ltd) v Secretary of State for Communities and Local Government* [2015] EWHC 827 (Admin), at [56]:

> "I do not think it is necessary, or appropriate, to resort to other documents to help with the interpretation of Policy SS2. In the first place, the policy is neither obscure nor ambiguous. Secondly, the material on which Mr Edwards seeks to rely is not part of the core strategy. It is all extrinsic – though at least some of the documents constituting the evidence base for the core strategy are mentioned in its policies, text and appendices, and are listed in a table in Appendix 6. Thirdly, as Mr Moules and Mr Brown submit, when the court is faced with having to construe a policy in an adopted plan it cannot be expected to rove through the background documents to the plan's preparation, delving into such of their content as might seem relevant. One would not expect a landowner or a developer or a member of the public to have to do that to gain an understanding of what the local planning authority had had in mind when it framed a

> particular policy in the way that it did. Unless there is a particular difficulty in construing a provision in the plan, which can only be resolved by going to another document either incorporated into the plan or explicitly referred to in it, I think one must look only to the contents of the plan itself, read fairly as a whole. To do otherwise would be to neglect what Lord Reed said in paragraph 18 of his judgment in *Tesco Stores Ltd. v Dundee City Council* : that "[the] development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it", that the plan is "intended to guide the behaviour of developers and planning authorities", and that "the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained". In my view, to enlarge the task of construing a policy by requiring a multitude of other documents to be explored in the pursuit of its meaning would be inimical to the interests of clarity, certainty and consistency in the "plan-led system". As Lewison L.J. said in paragraph 14 of his judgment in *R. (on the application of TW Logistics Ltd.) v Tendring District Council* [2013] EWCA Civ 9, with which Mummery and Aikens L.JJ. agreed, "this kind of forensic archaeology is inappropriate to the interpretation of a document like a local plan …". The "public nature" of such a document is, as he said (at paragraph 15), "of critical importance". The public are, in principle, entitled to rely on it "as it stands, without having to investigate its provenance and evolution"."

79. All parties contended that the meaning of Policy D9 was clear and unambiguous, despite the differences in their interpretation of it. In those circumstances, applying the principles set out above, I consider that I ought not to have regard to the letter from the Secretary of State to the Defendant dated 10 December 2020 (paragraph 46 above) as it is not a public document which members of the public could reasonably be expected to access when reading Policy D9. Furthermore, it is of limited value as, taken at its highest, it sets out the Secretary of State's intentions, whereas the Court must consider the meaning of the words actually used in Policy D9, as amended by DR12, which in my view did not give effect to the expressed intentions in the letter. However, I do consider that it is appropriate to have regard to the ITP draft London Plan Policy D9, which was referred to in the Hearing Report, and the Secretary of State's Direction which is in the public domain and was referenced in the Update Report, and the introduction to the London Plan 2021. This demonstrates the differences between the ITP draft version of Policy D9, on the basis of which the initial decision to grant planning permission was granted, and the final version of Policy D9, following the Secretary of State's direction, on the basis of which the reconsideration decision was made.

80. In my judgment, the Claimant's interpretation of Policy D9 cannot be correct, for the reasons given by the Defendant and IP1 and 3.

81. Read straightforwardly, objectively and as a whole, policy D9:

    i) requires London Boroughs to define tall buildings within their local plans, subject to certain specified guidance (Part A);

    ii) requires London Boroughs to identify within their local plans suitable locations for tall buildings (Part B);

    iii) identifies criteria against which the impacts of tall buildings should be assessed (Part C); and

    iv) makes provision for public access (Part D).

82. There is no wording which indicates that Part A and/or Part B are gateways, or pre-conditions, to Part C. In order to give effect of Mr Howell Williams QC's interpretation, it is necessary to read the words underlined below into the first line of Part C to spell out its true meaning:

> "Development proposals <u>in locations that have been identified in development plans under Part B</u> should address the following impacts."

    But if that had been the intention, then words to that effect would have been included within the policy. It would have been a straightforward exercise in drafting. It is significant that the Secretary of State's direction only required the addition of the word "suitable" to Part B(3). It did not add any text which supports or assists the Claimant's interpretation, even though the Secretary of State had the opportunity to do so.

83. In my view, the context is critical to the interpretation. Policy D9 is a planning policy in a development plan. By section 70(2) TCPA 1990 and section 38(6) PCPA 2004, there is a presumption that a determination will be made in accordance with the plan, unless material considerations indicate otherwise. Thus, the decision-maker "will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it": per Lord Clyde in *City of Edinburgh* at 1459G. Furthermore, the decision-maker must understand the relevant provisions of the plan "recognising that they may sometimes pull in different directions": per Lindblom LJ in *BDW Trading Ltd* at [21], and extensive authorities there cited in support of that proposition. As Lord Reed explained in *Tesco Stores Ltd v Dundee City Council*, "development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another".

84. The drafter of Policy D9, and the Defendant who is the maker of the London Plan, must have been aware of these fundamental legal principles, and therefore that it was possible that the policy in paragraph B(3) might not be followed, in any particular determination, if it was outweighed by other policies in the development plan, or by material considerations. It seems likely that policy provision was made for such cases, given the importance of the issue.

85. In considering whether to grant planning permission for a tall building which did not comply with paragraph B(3), because it was not identified in the development plan, it

would surely be sensible, and in accordance with the objectives of Policy D9, for the proposal to be assessed by reference to the potential impacts which are listed in Part C. The Claimant's interpretation leads to the absurd result that a decision-maker in those circumstances is not permitted to have regard to Part C, and must assess the impacts of the proposal in a vacuum.

86. In these circumstances, it is unsurprising that there are at least three decisions, both prior to and since the Defendant's decision in this case, in which the Claimant's planning officers have interpreted Policy D9 in the same way as the Defendant, in considering other tall building proposals in Hillingdon.

87. In this case, the extracts from the officer reports which I have referred to above, explain that the Mayor found that the proposal did not fully accord with Policy D9, because it had not been identified as suitable in the development plan under Part B. Notwithstanding the non-compliance with Part B of Policy D9, the Defendant determined that the proposal accorded with the provisions of the development plan when read as a whole. That was a planning judgment, based on the benefits of the proposal, such as the contribution of much-needed housing, in particular affordable housing, and the suitability of the Site (brownfield and sustainable, with good transport). The Defendant was satisfied, on the advice of the GLA officers, that sufficient protection from air quality impacts would be achieved. The Defendant was entitled to make this judgment, in the exercise of his discretion.

88. For the reasons set out above, Ground 1 does not succeed.

Ground 2

Claimant's submission

89. The Claimant submitted that the Defendant erred in law in failing to take into account a material consideration, namely, the Claimant's consultation response and accompanying expert evidence – the AQE Report – on the issue of air quality, which was submitted on 28 August 2020.

Conclusions

90. On the evidence, I accept the Defendant's submission that it did not fail to take account of the Claimant's evidence on the air quality impacts of the proposed development. Rather, on the advice of GLA officers, the Defendant exercised his planning judgment to conclude that the development would comply with relevant policy in respect of air quality impacts, and that additional mitigation in the form of a "damage cost" payment was not justified. That was a legitimate exercise of planning judgment which discloses no error of law, particularly in circumstances where the Claimant had previously agreed that no such payment was required.

91. In September and October 2019, Create produced their initial air quality assessments.

92. The Claimant refused the application for planning permission on the ground, *inter alia*, that the air quality assessments provide insufficient information and air quality neutrality was not demonstrated.

93. In April and June 2020, Create produced further assessments. They concluded that the proposal would be air quality neutral such that a damage cost payment would not be required.

94. The Defendant's Hearing Report expressly recorded comments made by AQE in respect of air quality, including concerns raised regarding air quality neutrality, and a calculated £294,522 payment to deliver the air quality local action plan (paragraph 79). This was when the application for planning permission was being considered by the Claimant. The Defendant did not receive the August 2020 AQE Report in time to include reference to it in the Hearing Report.

95. The Hearing Report had a section devoted to air quality, which stated, *inter alia*, at paragraph 2(iv):

> "The applicant's Air Quality Assessment has been reviewed by GLA officers, and is supported. The development would be air quality neutral, subject to the mitigation measures secured."

96. On 28 August 2020, the Claimant provided the Defendant with the AQE Report, together with representations requesting refusal of the application; alternatively an air quality section 106 contribution of £218,139. AQE concluded in its Report that the proposal gave rise to significant air quality constraints, that it would not be air quality neutral and that a damage cost payment would be required.

97. The GLA's Addendum Hearing Report dated 3 September 2020 stated:

> "In addition to this the Council has provided a technical response on air quality produced by AQE Global (August 2020). It should be noted that the Council has requested (should the GLA be minded to approve the scheme) a contribution of £218,139 to be paid to Hillingdon to deliver its air quality local action plan and or implement specific measures on/along the road network affected by the proposals that reduce vehicle emissions and or reduce human exposure to pollution levels. GLA officers note that this contribution has not been agreed and is subject to further discussion."

98. The Addendum Hearing Report did not address the substance of the criticisms in the AQE Report. However, as the AQE Report had only just been sent to the Defendant, and the Addendum Hearing Report was published on the day of the hearing, it seems likely that there had been insufficient time to analyse it in any depth. The Addendum Hearing Report recorded that all representations had been made available to the Mayor.

99. At the hearing on 3 September 2020, the presenting officer expressly drew attention to the Claimant's air quality reason for refusal and he devoted a section of his presentation to the air quality issue.

100. The Claimant's Head of Planning spoke in objection to the application. He explained that the Claimant had "concerns" regarding air quality impacts on future occupiers and that it considered there to be "various technical flaws" in the IPs' air quality assessment. He added: "I would stress that the Claimant considers an air quality section 106 contribution is still required." Residents and residents' association representatives also raised concerns about air quality.

101. The representative for IP1 and 3, Mr Johnson, addressed air quality during his representations. The Mayor expressly stated that the issue of air quality was a concern and he directly questioned Mr Johnson about it.

102. When announcing his decision to grant planning permission, the Mayor said:

> "Air quality is of course a very important issue for me. I have carefully considered the technical evidence made available to me and my view is that the barrier block form of development will ensure that future residents will not be disadvantaged, subject to the mitigation measures recommended."

103. On 10 September 2020, the Claimant's solicitor sent the solicitors for IP1 and 3 an updated draft section 106 agreement. In reply, the solicitors took the point that the development had been found to be air quality neutral and so an air quality contribution was not required. They invited the Claimant's solicitor to take officer instructions. In an email dated 13 October 2020, the Claimant's solicitor stated:

> "Air Quality – My clients instructions are that we agree for these to be deleted from the [section 106] agreement."

104. In October 2020, Create produced a Technical Note in response to the criticisms in the AQE Report. It was not provided to the Claimant for comment, and I address that issue under Ground 3.

105. The Claimant made further submissions on air quality in its representations on reconsideration on 26 March 2021. It argued that the GLA officers had been wrong to advise in the Hearing Report that the proposal was air quality neutral. It complained that there was no evidence that the AQE Report had been considered, and it re-submitted it.

106. The Update Report did not refer to the issue of air quality. The Update Report noted the receipt of the Urgent Representation and the AQE Report and commented as follows:

> "….the Council raises concerns that its Air Quality Peer Review was not considered by GLA officers because it is not mentioned in the Representation Hearing Report. This is because this information was submitted to the GLA by the Council on 28 August 2020 along with its pre-hearing representation, more than one working day after the Representation Hearing Report was published. The Council's pre-hearing representation and Air Quality Peer Review was addressed in the addendum report published on the day of the hearing.

> GLA officers consider the application to be in accordance with planning policy regarding air quality and as such the 'damage cost' payment requested by the Council is not justified…."

107. I conclude that there is ample evidence that the GLA officers and the Mayor had sufficient regard to the air quality issues, including those raised by the Claimant. Although the Claimant's representations and evidence were noted, not analysed, in the officer reports, such reports should be read benevolently and without undue rigour (*Mansell*, per Lindblom LJ at [42]), bearing in mind that it is part of a planning officer's expert function to make an assessment of how much information needs to be included in his or her report. On the balance of probabilities, I am satisfied that the specialist air quality officers at the GLA will have considered the AQE Report and Create's Technical Note in response to it. Ultimately, the GLA officers and the Defendant preferred Create's expert evidence to that of the AQE, which they were entitled to do.

108. For the reasons set out above, Ground 2 does not succeed.

Ground 3

Claimant's submission

109. The Claimant submitted that the Defendant acted unlawfully and/or in a manner which was procedurally unfair in that he failed either to (a) formally re-consult the Claimant; or (b) give the Claimant a right to be heard prior to his re-determination of the application.

110. The Claimant submitted that the Defendant should have followed the procedure set out in section 2F TCPA 1990, which sets out in law the procedure by which a local planning authority is to be consulted before the Defendant may determine an application in respect of which he has made a section 2A direction. This procedure envisages, prior to any decision, the publication of the Defendant's officers' report and recommendations at least 7 days prior; the opportunity to make written representations in the light of that report and those recommendations; and the opportunity to make oral representations at a mandatory further representations hearing. On the requirement for an oral hearing, the Claimant referred to the principles set out in the case of *Osborne v Parole Board* [2013] UKSC 61, per Lord Reed at [67]-[68], [71], which were applicable here.

111. As a matter of fairness, the Update Report ought to have been published prior to the Claimant making its submissions, to enable the Claimant to know how the GLA officers intended to advise the Mayor. The Claimant was unable to comment on the Defendant's new planning balance, reached in the light of the new London Plan policies and other material considerations.

112. Furthermore, the Claimant should have been given an opportunity to comment on Create's Technical Note, produced in October 2020.

Conclusions

113. In this case, the Defendant clearly accepted that the *Kides* principle applied and that the application ought to be re-determined in the light of the adoption of the London Plan 2021, as amended pursuant to the Secretary of State's direction, which was now part of the development plan.

114. It was common ground that the application should be re-determined in accordance with the requirements of fairness. The issue is what were the requirements of fairness in these circumstances?

115. Where an act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. What fairness demands is dependent on the context of the decision (*R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, per Lord Mustill, at 560 D – G).

116. In *Keep Wythenshawe Special Ltd v NHS Central Manchester CCG* [2016] EWHC 17 (Admin), Dove J. helpfully set out the established principles on consultation, at [65]-[68]:

> "65. The basic requirements of a lawful consultation have now been settled for some considerable time and are derived from the decision of Hodgson J in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168. They are, firstly, that the consultation should be undertaken at a time when the proposals are still at a formative stage. Secondly, the body undertaking the consultation should provide sufficient reasons and explanation for the decision about which it is consulting to enable the consultees to provide a considered and informed response. Thirdly, adequate time to allow for consideration and response must be provided. Fourthly, the responses to the consultation must be conscientiously taken into account in reaching the decision about which the public body is consulting. These principles, known as the Sedley criteria as a result of the author of the submissions upon which they were based, have recently been endorsed by the Supreme Court in *R(Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947 at paragraph 26.
>
> 66. In his judgment in Moseley Lord Wilson JSC emphasised that however the duty to consult arises, the manner in which it is conducted will be informed by the common law requirements of fairness. He observed at paragraph 24 as follows:
>
> > "Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R(Osborn) v Parole Board* [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of the person's legal rights. Nevertheless the first two of the

> purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, that requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not: 'yes or no, should we close this particular care home, this particular school etc?' It was: 'Required as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?'"

67. In his judgment Lord Reed JSC placed greater emphasis upon the statutory context and the purpose of the particular statutory duty to consult and less on the common law duty to act fairly. In paragraph 36 of his judgment, having noted that the case under consideration was not one where the duty to consult arose as a result of a legitimate expectation he stated:

> "This case is not concerned with a situation of that kind. It is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provisions in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or may be left to the discretion of the public authority; the consultation may take the form of seeking views in writing, or holding public meetings; and so on and so forth…"

Having noted that in that case the local authority was discharging an important function in relation to local government finance which affected its residents generally (the case centred on the authority's decision in relation to a revised scheme for council tax benefits) Lord Reed concluded that the purpose of the statutory duty to consult in that case was "to ensure public

participation in the local authority's decision-making process". He went on to observe in paragraph 39:

> "In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme."

He concluded that in the particular circumstances of that case the second of the Sedley criteria (the provision of adequate and appropriate information) had been breached.

68. The differences in emphasis between Lord Wilson JSC and Lord Reed JSC were resolved in the joint judgment of Baroness Hale JSC and Lord Clarke JSC in the following terms:

> "We agree with Lord Reed JSC that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context the duty of the local authority was to ensure public participation in the decision-making process. It seems to us that in order to do so it must act fairly by taking the specific steps set out by Lord Reed JSC, in para 39. In these circumstances we can we think safely agree with both judgments.""

117. Dove J. went on to consider the case law on the adequacy of a consultation procedure, at [77]:

> "77. Having observed all of the above in relation to the legal principles governing consultation it is important to recognise, as the courts have on several occasions, that a decision-maker will have a broad discretion as to how a consultation exercise may be structured and carried out. As Sullivan J (as he then was) observed in *R(on the application of Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] EWHC 311 at paragraphs 62 and 63:
>
> > "A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be

> recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out…In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went 'clearly and radically wrong'."
>
> Subsequently in the case of *R(JL and AT Beard) v The Environment Agency* [2011] EWHC 939 Sullivan LJ confirmed that the "test is whether the process was so unfair as to be unlawful"."

118. In the planning context, the courts have recognised that it is possible to amend planning applications during the course of their determination subject to two constraints, one substantive and one procedural. Permission should not be granted for development that would be substantially different from that which the application envisaged and persons affected by the change should not be deprived of the opportunity to comment on it. Where there is a statutory duty of consultation, the question of whether re-consultation is required if there is a change to the proposal depends on what fairness requires (*R (Holborn Studios) v Hackney Borough Council* [2017] EWHC 2823 (Admin) at [64], [70], [76]; [86]).

119. I do not consider that the provisions of section 2F TCPA 1990 apply to a re-consideration, when they have already been complied with at the first consideration. The procedure to be followed on a re-consideration is to be decided by the Defendant, in the exercise of his discretion. The requirements of fairness will vary depending on the nature of the re-consideration and the identity of those affected.

120. In my judgment, in the circumstances of this case, fairness required that the Claimant should have been given an opportunity to make representations on the developments which gave rise to the re-consideration, before the GLA officers made their recommendation to the Mayor, and before the Mayor made his re-determination. This was a development proposal of strategic importance, the Claimant is the local planning authority and it had been a key participant throughout.

121. The Defendant did comply with these requirements. The Claimant was given an opportunity to make written representations before the Update Report and its Addendum were issued and before the Mayor made the re-determination.

122. The Claimant submits that fairness required that it had sight of the Update Report before it submitted its further representations. I do not agree. It is clear from the Claimant's cogent letters of 26 February, 4 March and 9 March 2021, and its detailed written representations, that it was well aware of the issues to be addressed, and did so effectively.

123. In my judgment, fairness did not require another oral hearing. There was no "live" evidence, and the issues of planning policy and the planning balance to be considered were better suited to written representations, because of their detail and complexity. Members of the public, who might have struggled to make written representations, were not invited to participate in the re-consideration. Mr Rodger, Deputy Director Planning

and Regeneration, who had already made oral representations at the previous hearing, was well able to draft written representations on behalf of the Claimant.

124. The Technical Note from Create, dated October 2020, was not disclosed to the Claimant for comments. In my view, it ought to have been disclosed to the Claimant, as it was a response to the AQE Report submitted by the Claimant. The Claimant could then have commented upon it in its own representations to the Defendant, if it wished to do so. The failure to disclose was procedurally unfair and unlawful.

125. In determining whether any relief should be granted for the failure to disclose the Technical Note, section 31(2A) of the Senior Courts Act 1981 has to be considered. The effect of that provision is that the court must refuse to grant relief if it appears to the court to be highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred.

126. The approach to be taken to this provision has been considered by the courts, most notably in *R (Goring-on-Thames PC) v South Oxfordshire DC* [2018] EWCA Civ 860 and *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, at [272], [273].

127. The "conduct" complained of here is the failure to disclose the Technical Note to the Claimant in advance of the Defendant's decision of 29 March 2021. The "outcome" is the decision of the Defendant to grant planning permission. The issue is whether, had the Claimant been provided with the Technical Note, so that the Claimant had the opportunity to consider it and make further submissions in advance of the decision, it is "highly likely" that the Defendant nonetheless would have granted planning permission for the proposed development.

128. In my judgment, it is "highly likely" that the Defendant would nonetheless have granted planning permission on 29 March 2021.

129. The Technical Note did not introduce anything new. It did no more than correct misunderstandings in the AQE Review and indicated where the concerns raised by AQE had in fact been the subject of consideration, discussion and agreement with GLA officers at an earlier stage of the process, or were addressed and answered elsewhere.

130. I have already found that the Defendant lawfully concluded, in the exercise of his planning judgment that the development was acceptable in respect of air quality impacts, and he did so in knowledge of the Claimant's position and representations, and after receiving extensive information and advice from GLA officers. The advice he received was unequivocal. Realistically, it is highly unlikely that any further representations from the Claimant in response to the Technical Note would have made any difference to the Defendant's decision to grant planning permission.

131. Therefore, I refuse relief under section 31(2A) of the Senior Courts Act 1981 as it appears to me to be highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred.

132. For the reasons set out above, Ground 3 only succeeds in respect of the failure to disclose the Technical Note from Create, dated October 2020. No relief is granted.

Final conclusions

133. The claim succeeds solely in respect of the Defendant's failure to disclose to the Claimant the Technical Note, dated October 2020, prior to his re-determination of the decision to grant planning permission on 30 March 2021 (see paragraph 65 of the Claimant's skeleton argument). However, relief is refused under section 31(2A) of the Senior Courts Act 1981.

134. The claim for judicial review is dismissed on all other grounds.

Appendix 4. Tesco Stores Ltd v Dundee CC (2012)

*983 Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd and another intervening)

Positive/Neutral Judicial Consideration

Court
Supreme Court (Scotland)

Judgment Date
21 March 2012

Report Citation
[2012] UKSC 13
[2012] P.T.S.R. 983

ICLR

Supreme Court

Lord Hope of Craighead DPSC , Lord Brown of Eaton-under-Heywood , Lord Kerr of Tonaghmore , Lord Dyson , Lord Reed JJSC

2012 Feb 15, 16; March 21

Planning—Development—Local authority's development plan—Sequential approach to retail site selection required—Central development preferred—Proposal for out of town superstore—Objection that smaller district centre site available—Local authority determining that district centre site not suitable—Planning permission granted—Whether local authority applying the correct test for suitable site when applying sequential approach

A large supermarket group, A Ltd, submitted an application to the local authority for planning permission to build a superstore, comprising foodstore, café and petrol station, with associated car parking, access roads and landscaping at a disused industrial site on the outskirts of a city. The proposal also provided for improvements to the junction with the main road into the city and other neighbouring roads, the upgrading of a pedestrian underpass and the provision of footpaths and cycle ways. The local structure and development plans provided for a sequential approach to site selection for new retail development which meant that large out of centre retail development would only be acceptable when it could be established that no suitable site was available, in the first instance, within and thereafter on the edge of a city, town or district. A rival supermarket group, T Ltd, objected to the proposal on the basis that there was a suitable site within a local district centre which T Ltd had itself recently vacated. That site could, however, only accommodate a store of around half the size of the one proposed by A Ltd. The local authority accepted that A Ltd's proposal was not in accordance with the development plan with regard to, inter alia, retailing policy but concluded that the proposal did not undermine the core strategies of the plan and that the economic and planning benefits of the proposed development were of sufficient weight to justify granting planning permission subject to certain conditions. T Ltd petitioned the Court of Session for judicial review of the decision on the ground that the local authority had misinterpreted the development plan, in that, when applying the sequential approach to retail site selection the question was not, as the local authority had considered, whether a district centre site was "suitable for the development proposed by the applicant" but whether the site was "suitable for meeting identified deficiencies in retail provision in the area" and that error had vitiated the local authority's decision that a departure from the development plan was justified. The Lord Ordinary dismissed the petition and the Inner House refused T Ltd's reclaiming motion.

On appeal by T Ltd —

Held , dismissing the appeal, that, when considering whether material considerations justified departing from the development plan, a local authority was required to proceed on the basis of a proper interpretation of the relevant provisions which was a matter of textual interpretation not of planning judgment; that the natural reading of the strategic and development plans was that the word "suitable", in the context of the sequential approach, referred to the suitability of a site for the proposed development; that, however, it would be an over-simplification to say that the characteristics of a proposed development, such as its scale, were necessarily determinative for the purposes of the sequential test and an applicant was expected to ***984** have prepared his proposals in accordance with the development plan and to have thoroughly assessed sequentially preferable locations; that, provided the applicant had done so, the question for the local authority was whether an alternative site was suitable for the proposed development not whether the proposed development could be altered or reduced to fit an alternative site; that, further, even if the local authority had misinterpreted the development plan the error would only be material if there had been a real possibility that its determination might otherwise have been different; and that, in the circumstances, there had been no such possibility (post, paras 18, 21, 24–27, 28, 29, 31, 32, 35, 37, 38, 39).

Dicta of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1459, HL(Sc) applied* .

Decision of the *Inner House [2011] CSIH 9; 2011 SC 457 affirmed* .

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Edinburgh Council (City of) v Scottish Ministers 2001 SC 957
Edinburgh Council (City of) v Secretary of State for Scotland [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc)
Gransden & Co Ltd v Secretary of State for the Environment (1985) 54 P & CR 86; (1986) 54 P & CR 361, CA
Horsham District Council v Secretary of State for the Environment (1991) 63 P & CR 219, CA
Lidl UK GmbH v Scottish Ministers [2006] CSOH 165
Northavon District Council v Secretary of State for the Environment [1993] JPL 761
R v Derbyshire County Council, Ex p Woods [1998] Env LR 293; [1997] JPL 958, CA
R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2) [2001] Env LR 406; 81 P & CR 365
R v Teesside Development Corpn, Ex p William Morrison Supermarket plc [1998] JPL 23
R (Heath & Hampstead Society) v Vlachos [2008] EWCA Civ 193; [2008] 3 All ER 80, CA
R (Raissi) v Secretary of State for the Home Department [2008] EWCA Civ 72; [2008] QB 836; [2008] 3 WLR 375; [2008] 2 All ER 1023, CA
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)

The following additional cases were cited in argument:

Dawn Developments Ltd v South Lanarkshire Council [2011] CSOH 170
Derwent Holdings Ltd v Trafford Borough Council [2011] EWCA Civ 832; [2011] NPC 78, CA
Findlay's Executors v West Lothian District Council [2006] CSOH 188; [2007] RVR 263
Freeport Leisure plc v West Lothian Council 1998 SC 215
Land Securities Group plc v Scottish Ministers [2006] UKHL 48; 2007 SC (HL) 57, HL(Sc)

APPEAL from the Inner House of the Court of Session

The petitioner, Tesco Stores Ltd, sought judicial review of a decision dated 18 January 2010 of the local authority, Dundee City Council, to grant outline planning permission to the interveners, Asda Stores Ltd and MacDonald Estates Group plc, for the erection of a foodstore, café, petrol station and associated car parking, at Myrekirk Road, Dundee. In the Outer House of the Court of Session the Lord Ordinary, Lord Brailsford, dismissed ***985** the petition on 15 September 2010 [2010] CSOH 128. The petitioner reclaimed and on 11 February the Inner House (Lord Justice Clerk (Gill), Lord Emslie and Lady Smith) refused the motion 2011 SC 457. By a notice of appeal filed on 24 March 2011 the petitioner appealed to the Supreme Court. The grounds

of appeal were that the local authority had improperly interpreted the policy guidance laid down in Scottish Office Development Department, National Planning Policy Guideline 8: Town Centres and Retailing (Revised 1998) and failed to consider its own policy contained in the Dundee and Angus Structure Plan 2001–2016 and the Dundee Local Plan of August 2005.

The facts are stated in the judgment of Lord Reed JSC.

Martin Kingston QC and *Jane Munro* (instructed by *Semple Fraser LLP, Edinburgh*) for the petitioners.

Douglas Armstrong QC and *James Findlay QC* (instructed by *Gillespie Macandrew LLP, Edinburgh*) for the local authority.

Malcolm Thomson QC and *Kenny McBrearty* (instructed by *Brodies LLP, Edinburgh*) for the interveners.

The court took time for consideration.

21 March 2012. The following judgments were handed down.

LORD REED JSC (with whom LORD BROWN OF EATON-UNDER-HEYWOOD, LORD KERR OF TONAGHMORE and LORD DYSON JJSC agreed)

1. If you drive into Dundee from the west along the A90 (T), you will pass on your left a large industrial site. It was formerly occupied by NCR, one of Dundee's largest employers, but its factory complex closed some years ago and the site has lain derelict ever since. In 2009 Asda Stores Ltd and MacDonald Estates Group plc, the interveners in the present appeal, applied for planning permission to develop a superstore there. Dundee City Council, the respondents, concluded that a decision to grant planning permission would not be in accordance with the development plan, but was nevertheless justified by other material considerations. Their decision to grant the application is challenged in these proceedings by Tesco Stores Ltd, the petitioners, on the basis that the respondents proceeded on a misunderstanding of one of the policies in the development plan: a misunderstanding which, it is argued, vitiated their assessment of whether a departure from the plan was justified. In particular, it is argued that the respondents misunderstood a requirement, in the policies concerned with out of centre retailing, that it must be established that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres.

The legislation

2. Section 37(2) of the Town and Country Planning (Scotland) Act 1997 , as in force at the time of the relevant decision, provides:

> "In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

***986** Section 25 provides:

> "Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise— (a) to be made in accordance with that plan …"

The development plan

3. The development plan in the present case is an "old development plan" within the meaning of paragraph 1 of Schedule 1 to the 1997 Act. As such, it is defined by section 24 of the 1997 Act, as that section applied before the coming into force of section 2 of the Planning Etc (Scotland) Act 2006 , as including the approved structure plan and the adopted or approved local plan. The relevant structure plan in the present case is the Dundee and Angus Structure Plan, which became operative in 2002, at a time when the NCR plant remained in operation. As is explained in the introduction to the structure plan, its purpose is to provide a long term vision for the area and to set out the broad land use planning strategy guiding development and change. It includes a number of strategic planning policies. It sets the context for local plans, which translate the strategy into greater detail. Its preparation took account of national planning policy guidelines.

4. The structure plan includes a chapter on town centres and retailing. The introduction explains that the relevant government guidance is contained in National Planning Policy Guidance 8, *Town Centres and Retailing* (revised 1998). I note that that document ("NPPG 8") was replaced in 2006 by *Scottish Planning Policy: Town Centres and Retailing* ("SPP 8"), which was in force at the time of the decision under challenge, and which was itself replaced in 2010 by *Scottish Planning Policy* ("SPP"). The relevant sections of all three documents are in generally similar terms. The structure plan continues, at para 5.2:

> "A fundamental principle of NPPG 8 is that of the sequential approach to site selection for new retail developments … On this basis, town centres should be the first choice for such developments, followed by edge of centre sites and, only after this, out of centre sites which are currently or potentially accessible by different means of transport."

In relation to out of centre developments, that approach is reflected in *Town Centres and Retailing* Policy 4: Out of Centre Retailing:

> "In keeping with the sequential approach to site selection for new retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 square metres gross will only be acceptable where it can be established that: no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres; individually or cumulatively it would not prejudice the vitality and viability of existing city, town or district centres; the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of the above centres; the site is readily accessible by modes of transport other than the car; the proposal is consistent with other structure plan policies."

***987**

5. The relevant local plan is the Dundee Local Plan, which came into operation in 2005, prior to the closure of the NCR plant. Like the structure plan, it notes that national planning policy guidance emphasises the need to protect and enhance the vitality and viability of town centres. It continues, at para 52.2:

> "As part of this approach planning authorities should adopt a sequential approach to new shopping developments with first preference being town centres, which in Dundee's case are the city centre and the district centres."

That approach is reflected in Policy 45: Location of New Retail Developments:

> "The city centre and district centres will be the locations of first choice for new or expanded retail developments not already identified in the local plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that: (a) no suitable site is available, in the first instance, within and thereafter on the edge of the city centre or district centres; and (b) individually or cumulatively it would not prejudice the vitality and viability of the city centre or district centres; and (c) the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of these centres; and (d) the site is readily accessible by modes of transport other than the car; and (e) the proposal is consistent with other local plan policies."

6. It is also relevant to note the guidance given in NPPG 8, as revised in 1998, to which the retailing sections of the structure plan and the local plan referred. Under the heading "Sequential Approach", the guidance stated:

> "12. Planning authorities and developers should adopt a sequential approach to selecting sites for new retail, commercial leisure developments and other key town centre uses … First preference should be for town centre sites, where sites or buildings suitable for conversion are available, followed by edge of centre sites, and only then by out of centre sites in locations that are, or can be made easily accessible by a choice of means of transport …
>
> "13. In support of town centres as the first choice, the Government recognises that the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. In preparing their proposals developers and retailers should have regard to the format, design, scale of the development, and the amount of car parking in relation to the circumstances of the particular town centre. In addition they should also address the need to identify and assemble sites which can meet not only their requirements, but in a manner sympathetic to the town setting. As part of such an approach, they should consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale might offer a better fit with existing development in the town centre …
>
> "14. Planning authorities should also be responsive to the needs of retailers and other town centre businesses. In consultation with the private sector, they should assist in identifying sites in the town centre ***988*** which could be suitable and viable, for example, in terms of size and siting for the proposed use, and are likely to become available in a reasonable time …
>
> "15. Only if it can be demonstrated that all town centre options have been thoroughly addressed and a view taken on availability, should less central sites in out of centre locations be considered for key town centre uses. Where development proposals in such locations fall outwith the development plan framework, it is for developers to demonstrate that town centre and edge of centre options have been thoroughly assessed. Even where a developer, as part of a sequential approach, demonstrates an out of centre location to be the most appropriate, the impact on the vitality and viability of existing centres still has to be shown to be acceptable …"

The consideration of the application

7. The interveners' application was for planning permission to develop a foodstore, café and petrol filling station, with associated car parking, landscaping and infrastructure, including access roads. The proposals also involved improvements to the junction

with the A90 (T), the upgrading of a pedestrian underpass, the provision of footpaths and cycle ways, and improvements to adjacent roadways. A significant proportion of the former NCR site lay outside the application site. It was envisaged that vehicular access to this land could be achieved using one of the proposed access roads.

8. In his report to the respondents, the Director of City Development advised that the application was contrary to certain aspects of the employment and retailing policies of the development plan. In relation to the employment policies, in particular, the proposal was contrary to policies which required the respondents to safeguard the NCR site for business use. The director considered however that the application site was unlikely to be redeveloped for business uses in the short term, and that its redevelopment as proposed would improve the development prospects of the remainder of the NCR site. In addition, the infrastructure improvements would provide improved access which would benefit all businesses in an adjacent industrial estate.

9. In relation to the retailing policies, the director considered the application in the light of the criteria in Retailing Policy 4 of the structure plan. In relation to the first criterion he stated:

> "It must be demonstrated, in the first instance, that no suitable site is available for the development either within the city/district centres or, thereafter on the edge of these centres … While noting that the Lochee district centre lies within the primary catchment area for the proposal, [the retail statement submitted on behalf of the interveners] examines the potential site opportunities in and on the edge of that centre and also at the Hilltown and Perth Road district centres. The applicants conclude that there are no sites or premises available in or on the edge of existing centres capable of accommodating the development under consideration. Taking account of the applicant's argument it is accepted that at present there is no suitable site available to accommodate the proposed development."

***989** In relation to the remaining criteria, the director concluded that the proposed development was likely to have a detrimental effect on the vitality and viability of Lochee district centre, and was therefore in conflict with the second criterion. The potential impact on Lochee could however be minimised by attaching conditions to any permission granted so as to restrict the size of the store, limit the type of goods for sale and prohibit the provision of concessionary units. The proposal was also considered to be in conflict with the third criterion: there was no deficiency in shopping provision which the proposal would address. The fourth criterion, concerned with accessibility by modes of transport other than the car, was considered to be met. Similar conclusions were reached in relation to the corresponding criteria in Policy 45 of the local plan.

10. In view of the conflict with the employment and retailing policies, the director considered that the proposal did not fully comply with the provisions of the development plan. He identified however two other material considerations of particular significance. First, the proposed development would bring economic benefits to the city. The closure of the NCR factory had been a major blow to the economy, but the redevelopment of the application site would create more jobs than had been lost when the factory finally closed. The creation of additional employment opportunities within the city was considered to be a strong material consideration. Secondly, the development would also provide a number of planning benefits. There would be improvements to the strategic road network which would assist in the free flow of traffic along the A90 (T). The development would also assist in the redevelopment of the whole of the former NCR site through the provision of enhanced road access and the clearance of buildings from the site. The access improvements would also assist in the development of an economic development area to the west. These benefits were considered to be another strong material consideration.

11. The director concluded that the proposal was not in accordance with the development plan, particularly with regard to the employment and retailing policies. There were however other material considerations of sufficient weight to justify setting aside those policies and offering support for the development, subject to suitable conditions. He accordingly recommended that consent should be granted, subject to specified conditions.

12. The application was considered by the respondents' entire council sitting as the respondents' development quality committee. After hearing submissions on behalf of the interveners and also on behalf of the petitioners, the respondents decided to follow the director's recommendation. The reasons which they gave for their decision repeated the director's conclusions:

> "It is concluded that the proposal does not undermine the core land use and environmental strategies of the development plan. The planning and economic benefits that would accrue from the proposed development would be important to the future development and viability of the city as a regional centre. These benefits are considered to be of a significant weight and sufficient to set aside the relevant provisions of the development plan."

**990*

The present proceedings

13. The submissions on behalf of the petitioners focused primarily upon an alleged error of interpretation of the first criterion in Retailing Policy 4 of the structure plan, and of the equivalent criterion in Policy 45 of the local plan. If there was a dispute about the meaning of a development plan policy which the planning authority was bound to take into account, it was for the court to determine what the words were capable of meaning. If the planning authority attached a meaning to the words which they were not properly capable of bearing, then it made an error of law, and failed properly to understand the policy. In the present case, the director had interpreted "suitable" as meaning "suitable for the development proposed by the applicant"; and the respondents had proceeded on the same basis. That was not however a tenable meaning. Properly interpreted, "suitable" meant "suitable for meeting identified deficiencies in retail provision in the area". Since no such deficiency had been identified, it followed on a proper interpretation of the plan that the first criterion did not require to be considered: it was inappropriate to undertake the sequential approach. The director's report had however implied that the first criterion was satisfied, and that the proposal was to that extent in conformity with the sequential approach. The respondents had proceeded on that erroneous basis. They had thus failed to identify correctly the extent of the conflict between the proposal and the development plan. In consequence, their assessment of whether other material considerations justified a departure from the plan was inherently flawed.

14. The respondents had compounded their error, it was submitted, by treating the proposed development as definitive when assessing whether a "suitable" site was available. That approach permitted developers to drive a coach and horses through the sequential approach: they could render the policy nugatory by the simple expedient of putting forward proposals which were so large that they could only be accommodated outside town and district centres. In the present case, there was a site available in Lochee which was suitable for food retailing and which was sequentially preferable to the application site. The Lochee site had been considered as part of the assessment of the proposal, but had been found to be unsuitable because it could not accommodate the scale of development to which the interveners aspired.

15. In response, counsel for the respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. Counsel accepted that, if there was a dispute about the meaning of the words in a policy document, it was for the court to determine as a matter of law what the words were capable of meaning. The planning authority would only make an error of law if it attached a meaning to the words which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The respondents had proceeded on the basis that the proposal failed to accord with the second and third criteria. In those circumstances, the respondents had correctly concluded that the proposal was contrary to the policies in question. How the proposal had been assessed against the first criterion was immaterial.

16. So far as concerned the assessment of "suitable" sites, the interveners' retail statement reflected a degree of flexibility. There had been **991* a consideration of all sites of at least 2.5 hectares, whereas the application site extended to 6.68 hectares. The interveners had also examined sites which could accommodate only food retailing, whereas their application had been for both food and non-food retailing. The Lochee site extended to only 1.45 hectares, and could accommodate a store of only half the size proposed. It also had inadequate car parking. The director, and the respondents, had accepted that it was not a suitable site for these reasons.

Discussion

17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment (1985) 54 P & CR 86, 94, per Woolf J, affirmed (1986) 54 P & CR 361* ; *Horsham District Council v Secretary of State for the Environment (1991) 63 P & CR 219* , 225–226, per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25 , namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the *House of Lords in the case of City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447* . It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 1459, his Lordship observed:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."

18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the pla n of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in ***992*** decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department [2008] QB 836*), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759* , 780, per Lord Hoffmann. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20. The principal authority referred to in relation to this matter was the judgment of Brooke LJ in *R v Derbyshire County Council, Ex p Woods [1997] JPL 958* , 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision-maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy."

By way of illustration, Brooke LJ referred to the earlier case of *Northavon District Council v Secretary of State for the Environment [1993] JPL 761* , which concerned a policy applicable to "institutions standing in extensive grounds". As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of *R (Heath & Hampstead Society) v Vlachos [2008] 3 All ER 80* , where a planning authority's decision that a replacement dwelling was not "materially larger" than its predecessor, ***993*** within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase "materially larger" referred to the size of the new building compared with its predecessor, rather than requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in *City of Edinburgh Council v Scottish Ministers 2001 SC 957* the reporter's decision that a licensed restaurant constituted "similar licensed premises" to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

21. A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.

22. It is of course true, as counsel for the respondents submitted, that a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion, on the question whether the proposal was in accordance with the policy, as it would have reached if it had construed the policy correctly. That is not however a complete answer to a challenge to the planning authority's decision. An error in relation to one part of a policy might affect the overall conclusion as to whether a proposal was in accordance with the development plan even if the question whether the proposal was in conformity with the policy would have been answered in the same way. The policy criteria with which the proposal was considered to be incompatible might, for example, be of less weight than the criteria which were mistakenly thought to be fulfilled. Equally, a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion as it would otherwise have reached on the question whether the proposal was in accordance with the development plan. Again, however, that is not a complete answer. Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.

23. In the present case, the Lord Ordinary rejected the petitioners' submissions on the basis that the interpretation of planning policy was always primarily a matter for the planning authority, whose assessment could be challenged only on the basis of unreasonableness: there was, in particular, more than one way in which the sequential approach could reasonably be applied: [2010] CSOH 128 at [23]. For the reasons I have explained, that approach does not correctly reflect the role which the court has to play in the determination of the meaning of the development plan. A different approach was adopted by the Second Division: since, it was said, ***994*** the proposal was in head-on conflict with the retail and employment policies of the development plan, and the sequential approach offered no justification for it, a challenge based upon an alleged misapplication of the sequential approach was entirely beside the point: 2011 SC 457, para 38. For the reasons I have explained, however, even where a proposal is plainly in breach of policy and contrary to the development plan, a failure properly to understand the policy in question may result in a failure to appreciate the full extent or significance of the departure from the development plan which the grant of consent would involve, and may consequently vitiate the planning authority's determination. Whether there has in fact been

a misunderstanding of the policy, and whether any such misunderstanding may have led to a flawed decision, has therefore to be considered.

24. I turn then to the question whether the respondents misconstrued the policies in question in the present case. As I have explained, the petitioners' primary contention is that the word "suitable", in the first criterion of Retailing Policy 4 of the structure plan and the corresponding Policy 45 of the local plan, means "suitable for meeting identified deficiencies in retail provision in the area", whereas the respondents proceeded on the basis of the construction placed upon the word by the Director of City Development, namely "suitable for the development proposed by the applicant". I accept, subject to a qualification which I shall shortly explain, that the director and the respondents proceeded on the latter basis. Subject to that qualification, it appears to me that they were correct to do so, for the following reasons.

25. First, that interpretation appears to me to be the natural reading of the policies in question. They have been set out in paras 4 and 5 above. Read short, Retailing Policy 4 of the structure plan states that proposals for new or expanded out of centre retail developments will only be acceptable where it can be established that a number of criteria are satisfied, the first of which is that "no suitable site is available" in a sequentially preferable location. Policy 45 of the local plan is expressed in slightly different language, but it was not suggested that the differences were of any significance in the present context. The natural reading of each policy is that the word "suitable", in the first criterion, refers to the suitability of sites for the proposed development: it is the proposed development which will only be acceptable at an out of centre location if no suitable site is available more centrally. That first reason for accepting the respondents' interpretation of the policy does not permit of further elaboration.

26. Secondly, the interpretation favoured by the petitioners appears to me to conflate the first and third criteria of the policies in question. The first criterion concerns the availability of a "suitable" site in a sequentially preferable location. The third criterion is that the proposal would address a deficiency in shopping provision which cannot be met in a sequentially preferable location. If "suitable" meant "suitable for meeting identified deficiencies in retail provision", as the petitioners contend, then there would be no distinction between those two criteria, and no purpose in their both being included.

27. Thirdly, since it is apparent from the structure and local plans that the policies in question were intended to implement the guidance given in NPPG 8 in relation to the sequential approach, that guidance forms part of the relevant context to which regard can be had when interpreting the policies. The material parts of the guidance are set out in para 6 above. ***995*** They provide further support for the respondents' interpretation of the policies. Para 13 refers to the need to identify sites which can meet the requirements of developers and retailers, and to the scope for accommodating the proposed development. Para 14 advises planning authorities to assist the private sector in identifying sites which could be suitable for the proposed use. Throughout the relevant section of the guidance, the focus is upon the availability of sites which might accommodate the proposed development and the requirements of the developer, rather than upon addressing an identified deficiency in shopping provision. The latter is of course also relevant to retailing policy, but it is not the issue with which the specific question of the suitability of sites is concerned.

28. I said earlier that it was necessary to qualify the statement that the director and the respondents proceeded, and were correct to proceed, on the basis that "suitable" meant "suitable for the development proposed by the applicant". As para 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corpn, Ex p William Morrison Supermarket plc [1998] JPL 23* , 43, to refuse an out of centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out of centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge of centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

29. It follows from the foregoing that it would be an over-simplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified

to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in Lidl UK GmbH v Scottish Ministers [2006] CSOH 165 at [14], whether an alternative site is suitable for the proposed development, not **996* whether the proposed development can be altered or reduced so that it can be made to fit an alternative site.

30. In the present case, it is apparent that a flexible approach was adopted. The interveners did not confine their assessment to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing. Even taking that approach, however, they did not regard the Lochee site vacated by the petitioners as being suitable for their needs: it was far smaller than they required, and its car parking facilities were inadequate. In accepting that assessment, the respondents exercised their judgment as to how the policy should be applied to the facts: they did not proceed on an erroneous understanding of the policy.

31. Finally, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different. In the particular circumstances of the present case, I am not persuaded that there was any such possibility. The considerations in favour of the proposed development were very powerful. They were also specific to the particular development proposed: on the information before the respondents, there was no prospect of any other development of the application site, or of any development elsewhere which could deliver equivalent planning and economic benefits. Against that background, the argument that a different decision might have been taken if the respondents had been advised that the first criterion in the policies in question did not arise, rather than that criterion had been met, appears to me to be implausible.

Conclusion

32. For these reasons, and those given by Lord Hope of Craighead DPSC, with which I am in entire agreement, I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD DPSC

33. The question that lies at the heart of this case is whether the respondents acted unlawfully in their interpretation of the sequential approach which both the structure plan and the relevant local plan required them to adopt to new retail developments within their area. According to that approach, proposals for new or expanded out of centre developments of this kind are acceptable only where it can be established, among other things, that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres. Is the test as to whether no suitable site is available in these locations, when looked at sequentially, to be addressed by asking whether there is a site in each of them in turn which is suitable for the proposed development? Or does it direct attention to the question whether the proposed development could be altered or reduced so as to fit into a site which is available there as a location for this kind of development?

34. The sequential approach is described in National Planning Policy Guidance Policy 8, *Town Centres and Retailing* , para 5.2 as a fundamental principle of NPPG 8. In R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2) [2001] Env LR 406 , paras 48–49, Sullivan J said that it **997* was not unusual for development plan polices to pull in different directions and, having regard to what Lord Clyde said about the practical application of the statutory rule in *City of Edinburgh v Secretary of State for Scotland [1997] 1 WLR 1447* , 1459, that he regarded as untenable the proposition that if there was a breach of any one policy in a development plan a proposed development could not be said to be "in accordance with the plan". In para 52, he said that the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided.

35. I see no reason to question these propositions, to which Mr Kingston for the petitioners drew our attention in his reply to Mr Armstrong's submissions for the respondents. But I do not think that they are in point in this case. We are concerned here with a particular provision in the planning documents to which the respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128 at [23], is the interpretation of the policy which it sets out primarily a matter for the decision-maker. As Mr Thomson for the interveners pointed out, the challenge to the respondents' decision to

follow the director's recommendation and approve the proposed development is not that it was Wednesbury unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*) but that it was unlawful. I agree with Lord Reed JSC that the issue is one of law, reading the words used objectively in their proper context.

36. In Lidl UK GmbH v Scottish Ministers [2006] CSOH 165 the appellants appealed against a decision of the Scottish Ministers to refuse planning permission for a retail unit to be developed on a site outwith Irvine town centre. The relevant provision in the local plan required the sequential approach to be adopted to proposals for new retail development outwith the town centre boundaries. Among the criteria that had to be satisfied was the requirement that no suitable sites were available, or could reasonably be made available, in or on the edge of existing town centres. In other words, town centre sites were to be considered first before edge of centre or out of town sites. The reporter held that the existing but soon to be vacated Lidl town centre site was suitable for the proposed development, although it was clear as a matter of fact that this site could not accommodate it. In para 13, Lord Glennie noted that counsel for the Scottish Ministers accepted that a site would be "suitable" in terms of the policy only if it was suitable for, or could accommodate, the development as proposed by the developer. In para 14, he said that the question was whether the alternative town centre site was suitable for the proposed development, not whether the proposed development could be altered or reduced so that it could fit in to it.

37. Mr Kingston submitted that Lord Glennie's approach would rob the sequential approach of all its force, and in the Inner House it was submitted that his decision proceeded on a concession by counsel which ought not to have been made: 2011 SC 457, para 31. But I think that Lord Glennie's interpretation of the phrase was sound and that counsel was right to accept that it had the meaning which she was prepared to give to it. The wording of the relevant provision in the local plan in that case differed slightly from that ***998*** with which we are concerned in this case, as it included the phrase "or can reasonably be made available". But the question to which it directs attention is the same. It is the proposal for which the developer seeks permission that has to be considered when the question is asked whether no suitable site is available within or on the edge of the town centre.

38. The context in which the word "suitable" appears supports this interpretation. It is identified by the opening words of the policy, which refer to "proposals for new or expanded out of centre retail developments" and then set out the only circumstances in which developments outwith the specified locations will be acceptable. The words "the proposal" which appear in the third and fifth of the list of the criteria which must be satisfied serve to reinforce the point that the whole exercise is directed to what the developer is proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer. It is worth noting too that the phrase "no suitable site is available" appears in Policy 46 of the local plan relating to commercial developments. Here too the context indicates that the issue of suitability is directed to the developer's proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed JSC refers in para 28 above, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.

39. For these reasons which I add merely as a footnote I agree with Lord Reed JSC, for all the reasons he gives, that this appeal should be dismissed. I would affirm the Second Division's interlocutor.

Appeal dismissed .

Ms B L Scully, Barrister ***999***

Appendix 5. Hopkins Homes Ltd v SSCLG (2017)

Easter Term
[2017] UKSC 37
On appeals from: [2016] EWCA Civ 168, [2015] EWHC 132 (Admin) and [2015] EWHC 410 (Admin)

JUDGMENT

Suffolk Coastal District Council (Appellant) *v* Hopkins Homes Ltd and another (Respondents) Richborough Estates Partnership LLP and another (Respondents) *v* Cheshire East Borough Council (Appellant)

before

Lord Neuberger, President
Lord Clarke
Lord Carnwath
Lord Hodge
Lord Gill

JUDGMENT GIVEN ON

10 May 2017

Heard on 22 and 23 February 2017

Appellants (Cheshire and Suffolk)
Martin Kingston QC
Hugh Richards
Jonathan Clay
Dr Ashley Bowes
(Instructed by Sharpe Pritchard LLP)

Respondent (Hopkins)

Christopher Lockhart-Mummery QC
Zack Simons

(Instructed by DLA Piper UK LLP (Birmingham))

Respondent (Richborough)
Christopher Young
James Corbet Burcher
(Instructed by Town Legal LLP)

Respondent (SSCLG)
Hereward Phillpot QC
Richard Honey
(Instructed by The Government Legal Department)

LORD CARNWATH: (with whom Lord Neuberger, Lord Clarke, Lord Hodge and Lord Gill agree)

Introduction

1. The appeals relate to the proper interpretation of paragraph 49 of the National Planning Policy Framework ("NPPF"), which is in these terms:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

2. The Court of Appeal observed that the interpretation of this paragraph had been considered by the Administrative Court on seven separate occasions between October 2013 and April 2015 with varying results. The court had been urged by all counsel "to bring much needed clarity to the meaning of the policy". Notwithstanding the clarification provided by the impressive judgment of the court (given by Lindblom LJ), controversy remains. The appeals provide the opportunity for this court not only to consider the narrow issues of interpretation of para 49, but to look more broadly at issues concerning the legal status of the NPPF and its relationship with the statutory development plan.

3. Both appeals relate to applications for housing development, one at Yoxford in the administrative area of the Suffolk Coastal District Council ("the Yoxford site"), and the other near Willaston in the area of Cheshire East Borough Council ("the Willaston site"). In the first the council's refusal of permission was upheld by the inspector on appeal, but his refusal was quashed in the High Court (Supperstone J), and that decision was confirmed by the Court of Appeal. In the second, the council failed to determine the application, and the appeal was allowed by the inspector. The council's challenge succeeded in the High Court (Lang J), but that decision was reversed by the Court of Appeal, the judgment of the court being given by Lindblom LJ. Both councils appeal to this court.

The statutory provisions

4. The relevant statutory provisions are found in the Town and Country Planning Act 1990 ("the 1990 Act") and the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").

Plan-making

5. Part 2 of the 2004 Act deals with "local development". Each local planning authority in England is required to "keep under review the matters which may be expected to affect the development of their area or the planning of its development" (2004 Act section 13), and to prepare a "local development scheme", which (inter alia) specifies the local development documents which are to be "development plan documents" (section 15). The authority's local development documents "must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area" (section 17). "Local development documents" are defined by regulations made under section 17(7). In short they are documents which contain statements as to the development and use of land which the authority wishes to encourage, the allocation of sites for particular types of development, and development management and site allocations policies intended to guide determination of planning applications. Together they comprise the "development plan" or "local plan" for the area (Town and Country Planning (Local Planning) (England) Regulations (SI 2012/767) regulations 5 and 6).

6. In preparing such documents, the authority must have regard (inter alia) to "national policies and advice contained in guidance issued by the Secretary of State" (section 19(2)). Every development plan document must be submitted to the Secretary of State for "independent examination", one of the purposes being to determine whether it complies with the relevant statutory requirements, including section 19 (section 20(1)(5)(a)). The Secretary of State may, if he thinks that a local development document is "unsatisfactory", direct the local planning authority to modify the document (section 21). Section 39 gives statutory force to the concept of "sustainable development" (undefined). Any person or body exercising any function under Part 2 in relation to local development documents must exercise it "with the objective of contributing to the achievement of sustainable development", and for that purpose must have regard to "national policies and advice contained in guidance issued by the Secretary of State …" An adopted plan may be challenged on legal grounds by application to the High Court made within six weeks of the date of adoption, but not otherwise (section 113). Schedule 8 contained transitional provisions providing generally for a transitional period of three years, after which the plans produced under the previous system ceased to have effect subject to the power of the Secretary of State to "save" specified policies by direction.

Planning applications

7. Provision is made in the 1990 and 2004 Acts for the development plan to be taken into account in the handling of planning applications:

> *1990 Act section 70(2)*
>
> "In dealing with such an application the authority shall have regard to -
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."
>
> *2004 Act section 38(6)*
>
> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Unlike the development plan provisions, these sections contain no specific requirement to have regard to national policy statements issued by the Secretary of State, although it is common ground that such policy statements may where relevant amount to "material considerations".

8. The principle that the decision-maker should have regard to the development plan so far as material and "any other material considerations" has been part of the planning law since the Town and Country Planning Act 1947. The additional weight given to the development plan by section 38(6) reproduces the effect of a provision first seen in the Planning and Compensation Act 1991 section 54A. In *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, the equivalent provision (section 18A of the Town and Country Planning (Scotland) Act 1972) was described by Lord Hope (p 1450B) as designed to "enhance the status"

of the development plan in the exercise of the planning authority's judgment. Lord Clyde spoke of it as creating "a presumption" that the development plan is to govern the decision, subject to "material considerations", as for example where "a particular policy in the plan can be seen to be outdated and superseded by more recent guidance". However, the section had not touched the well-established distinction between the respective roles of the decision-maker and the court:

> "It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker …" (p 1458)

9. An appeal against a refusal of planning permission lies to the Secretary of State, who is subject to the same duty in respect of the development plan (1990 Act sections 78, 79(4)). Regulations under section 79(6) and Schedule 6 now provide for most categories of appeals, including those here in issue, to be determined, not by the Secretary of State, but by an "appointed person" (normally referred to as a planning inspector). The decision on appeal may be challenged on legal grounds in the High Court (section 288).

The National Planning Policy Framework

10. The Framework (or "NPPF") was published on 27 March 2012. One purpose, in the words of the foreword, was to "(replace) over a thousand pages of national policy with around 50, written simply and clearly", thus "allowing people and communities back into planning". The "Introduction" explains its status under the planning law:

> "Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The National Planning Policy Framework must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions. …"

11. NPPF is divided into three main parts: "Achieving sustainable development" (paragraphs 6 to 149), "Plan-making" (paragraphs 150 to 185) and "Decision-taking" (paragraphs 186 to 207). Paragraph 7 refers to the "three dimensions to sustainable development: economic, social and environmental". Paragraph 11 begins a group of paragraphs under the heading "the presumption in favour of sustainable development". Paragraph 12 makes clear that the NPPF "does not change the statutory status of the development plan as the starting point for decision making". Paragraph 13 describes the NPPF as "guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications".

12. Paragraph 14, which is important in the present appeals, deals with the "presumption in favour of sustainable development", which is said to be "at the heart of" the NPPF and which should be seen as "a golden thread running through both plan-making and decision-taking". It continues:

> "**For plan-making** this means that:
>
> - local planning authorities should positively seek opportunities to meet the development needs of their area;
>
> - Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
>
> - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted.
>
> For **decision-taking** this means:
>
> - approving development proposals that accord with the development plan without delay; and
>
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

- specific policies in this Framework indicate development should be restricted."

We were told that the penultimate point ("any adverse impacts …") is referred to by practitioners as "the tilted balance". I am content for convenience to adopt that rubric.

13. Footnote 9 (in the same terms for both parts) gives examples of the "specific policies" referred to:

> "For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion."

14. These are said to be examples. Thus the list is not exhaustive. Further, although the footnote refers in terms only to policies in the Framework itself, it is clear in my view that the list is to be read as including the related development plan policies. Paragraph 14 cannot, and is clearly not intended to, detract from the priority given by statute to the development plan, as emphasised in the preceding paragraphs. Indeed, some of the references only make sense on that basis. For example, the reference to "Local Green Space" needs to be read with paragraph 76 dealing with that subject, which envisages local communities being able "through local and neighbourhood plans" to identify for "special protection green areas of particular importance to them", and so "rule out new development other than in very special circumstances …"

15. Section 6 (paragraphs 47 to 55) is entitled "Delivering a wide choice of high quality homes". Paragraph 47 states the primary objective of the section:

> "To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in [the NPPF], including identifying key sites which are critical to the delivery of the housing strategy over the plan period;

- identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements with an additional buffer of 5% … to ensure choice and competition in the market for land. …;

- identify a supply of specific, developable sites or broad locations for growth, for years six to ten and, where possible, for years 11-15;

- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and

- set out their own approach to housing density to reflect local circumstances."

16. This group of provisions provides the context for paragraph 49, central to these appeals and quoted at the beginning of this judgment; and in particular for the advice that "relevant policies for the supply of housing" should not be considered "up-to-date", unless the authority can demonstrate a five-year supply of deliverable housing sites.

17. Section 12 is headed "Conserving and enhancing the historic environment" (paragraphs 126 to 141). It includes policies for "designated" and "non-designated" heritage assets, as defined in the glossary. The former cover such assets as World Heritage Sites, Scheduled Monuments and others designated under relevant legislation. A non-designated asset is one "identified as having a degree of significance meriting consideration in planning decisions because of its heritage interest". Paragraph 135 states:

> "The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

"Significance" in this context is defined by the glossary in Annex 2 as meaning "the value of a heritage asset to this and future generations because of its heritage interest", which may be derived "not only from a heritage asset's physical presence, but also from its setting".

18. Annex 1 ("Implementation") states that policies in the Framework "are material considerations which local planning authorities should take into account from the day of its publication" (paragraph 212); and that, where necessary, plans, should be revised as quickly as possible to take account of the policies "through a partial review or by preparing a new plan" (paragraph 213). However, it also provides that for a transitional period of a year decision-takers "may continue to give full weight to relevant policies adopted since 2004, even if there is a limited degree of conflict with this Framework" (paragraph 214); but that thereafter

> "… due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in [the NPPF], the greater the weight that may be given)." (paragraph 215)

NPPF - Legal status and Interpretation

19. The court heard some discussion about the source of the Secretary of State's power to issue national policy guidance of this kind. The agreed Statement of Facts quoted without comment a statement by Laws LJ (*R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] 1 WLR 3923, para 12) that the Secretary of State's power to formulate and adopt national planning policy is not given by statute, but is "an exercise of the Crown's common law powers conferred by the royal prerogative." In the event, following a query from the court, this explanation was not supported by any of the parties at the hearing. Instead it was suggested that his powers derived, expressly or by implication, from the planning Acts which give him overall responsibility for oversight of the planning system (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 140-143 per Lord Clyde). This is reflected both in specific

requirements (such as in section 19(2) of the 2004 Act relating to plan-preparation) and more generally in his power to intervene in many aspects of the planning process, including (by way of call-in) the determination of appeals.

20. In my view this is clearly correct. The modern system of town and country planning is the creature of statute (see *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 140-141). Even if there had been a pre-existing prerogative power relating to the same subject-matter, it would have been superseded (see *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] 2 WLR 583, para 48). (It may be of interest to note that the great *Case of Proclamations* (1610) 12 Co Rep 74, which was one of the earliest judicial affirmations of the limits of the prerogative (see *Miller* para 44) was in one sense a planning case; the court rejected the proposition that "the King by his proclamation may prohibit new buildings in and about London …".)

21. Although planning inspectors, as persons appointed by the Secretary of State to determine appeals, are not acting as his delegates in any legal sense, but are required to exercise their own independent judgement, they are doing so within the framework of national policy as set by government. It is important, however, in assessing the effect of the Framework, not to overstate the scope of this policy-making role. The Framework itself makes clear that as respects the determination of planning applications (by contrast with plan-making in which it has statutory recognition), it is no more than "guidance" and as such a "material consideration" for the purposes of section 70(2) of the 1990 Act (see *R* (*Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWHC 97 (Admin); [2011] 1 P & CR 22, para 50 per Lindblom J). It cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme.

Law and policy

22. The correct approach to the interpretation of a statutory development plan was discussed by this court in *Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening)* [2012] UKSC 13; 2012 SLT 739. Lord Reed rejected a submission that the meaning of the development plan was a matter to be determined solely by the planning authority, subject to rationality. He said:

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it.

> It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context." (para 18)

He added, however, that such statements should not be construed as if they were statutory or contractual provisions:

> "Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann) …" (para 19)

23. In the present appeal these statements were rightly taken as the starting point for consideration of the issues in the case. It was also common ground that policies in the Framework should be approached in the same way as those in a development plan. However, some concerns were expressed by the experienced counsel before us about the over-legalisation of the planning process, as illustrated by the proliferation of case law on paragraph 49 itself (see paras 27ff below). This is particularly unfortunate for what was intended as a simplification of national policy guidance, designed for the lay-reader. Some further comment from this court may therefore be appropriate.

24. In the first place, it is important that the role of the court is not overstated. Lord Reed's application of the principles in the particular case (para 18) needs to be

read in the context of the relatively specific policy there under consideration. Policy 45 of the local plan provided that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any "suitable site" within or linked to the existing centres (para 5). The short point was the meaning of the word "suitable" (para 13): suitable for the development proposed by the applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed identified as one of textual interpretation, "logically prior" to the exercise of planning judgment (para 21). As he recognised (see para 19), some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis.

25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692; [2009] PTSR 19, para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence (see *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49; [2008] 1 AC 678, para 30 per Lady Hale.)

26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two.

The two appeals

Evolving judicial guidance

27. To understand the reasoning of the two inspectors in the instant cases, it is necessary to set it in the context of the evolving High Court jurisprudence. The decisions in the two appeals were given in July and August 2014 respectively, after inquiries which ended in both cases in June. It is not entirely clear what information was available to the inspectors as to the current state of the High Court jurisprudence on this topic. The Yoxford inspector referred only to *William Davis v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin) (Lang J, 11 October 2013). This seems to have been the first case in which this issue had arisen. One of the grounds of refusal was based on a policy E20 the effect of which was generally to exclude development in a so-called "green wedge" area defined on the proposals map. Lang J recorded an argument for the developer that the policy should have been regarded as a "relevant policy for the supply of housing" under paragraph 49 because "the restriction on development potentially affects housing development". The judge rejected this argument summarily, saying "policy E20 does not relate to the *supply* of housing and therefore is not covered by paragraph 49" (her emphasis).

28. By the time the two inquiries in the present case ended (June 2014), and at the time of the decisions, it seems that the most recent judicial guidance then available on the interpretation of paragraph 49 was that of Ouseley J in *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Land* [2014] EWHC 573 (Admin) (10 March 2014) ("the *Barwood Land* case"). Ouseley J favoured a wider reading which "examines the degree to which a particular policy generally affects housing numbers, distribution and location in a significant manner". He thought that the language could not sensibly be given a very narrow meaning because

> "This would mean that policies for the provision of housing which were regarded as out of date, nonetheless would be given weight, indirectly but effectively through the operation of their counterpart provisions in policies restrictive of where development should go …"

He contrasted general policies, such as those protecting "the countryside", with policies designed to protect specific areas or features "such as gaps between settlements, the particular character of villages or a specific landscape designation, all of which could sensibly exist regardless of the distribution and location of housing or other development."

29. At that time, it seems to have been assumed that if a policy were deemed to be "out-of-date" under paragraph 49, it was in practice to be given minimal weight, in effect "disapplied" (see eg *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin), para 72 per Lewis J). In other words, it was treated for the purposes of paragraph 14 as non-policy, in the same way as if the development plan were "absent" or "silent". On that view, it was clearly important to establish which policies were or were not to be treated as out-of-date in that sense. Later cases (after the date of the present decisions) introduced a greater degree of flexibility, by suggesting that paragraph 14 did not take away the ordinary discretion of the decision-maker to determine the weight to be given even to an "out-of-date" policy; depending, for example, on the extent of the shortfall and the prospect of development coming forward to make it up (see eg *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin), para 71 per Lindblom J). As will be seen, this idea was further developed in Lindblom LJ's judgment in the present case.

The Yoxford site

30. In September 2013 Suffolk Coastal District Council refused planning permission for a development of 26 houses on land at Old High Road in Yoxford. The applicant, Hopkins Homes Ltd ("Hopkins"), appealed to an inspector appointed by the Secretary of State. He dismissed the appeal in a decision letter dated 15 July 2014, following an inquiry which began in February and ended in June 2014.

31. The statutory development plan for the area comprised the Suffolk Coastal District Local Plan ("SCDLP") adopted in July 2013, and certain "saved" policies from the previous local plan ("the old Local Plan") adopted in December 1994. Chapter 3 SCDLP set out a number of "strategic policies", including:

> i) Under the heading "Housing", Policy SP2 ("Housing numbers and Distribution") proposed as its "core strategy" to make provision for 7,900 new homes across the district in the period 2010-2027. In addition, "an early review" to be commenced by 2015 was to identify "the full, objectively assessed housing needs" for the district, with proposals to ensure that these were met so far as consistent with the NPPF. A table showed the proposed locations across the district to make up the total of 7,900 homes.
>
> ii) Under the heading "The Spatial Strategy", Policy SP19 ("Settlement Policy") identified Yoxford as one of a number of Key Service Centres, which provide "an extensive range of specified facilities", and where "modest estate-scale development" may be appropriate "within the defined physical limits" (under policy SP27 - "Key and Local Service Centres"). Outside these

settlements (under policy SP 29 - "The Countryside") there was to be "no development other than in special circumstances".

iii) The commentary to SP19 (para 4.05) explained that "physical limits boundaries" or "village envelopes" would be drawn up for the larger settlements, but that these limits are "a policy tool" and that where allocations are proposed outside the envelopes, the envelopes would be redrawn to include them.

32. In his report on the examination of the draft SCDLP, the inspector had commented on the adequacy of the housing provision (paras 31-51). He had noted how the proposed figure of 7,590 homes fell short of what was later agreed to be the requirement for the plan period of 11,000 extra homes. He had considered whether to suspend the examination to enable the council to assess the options. He decided not to do so, recognising that there were other sites which might come forward to boost supply, and the advantages of enabling these to be considered "in the context of an up-to-date suite of local development management policies that are consistent with the Framework …"

33. The "saved" policies from the old plan included:

AP4 ("Parks and gardens of historic or landscape interest")

"The District Council will encourage the preservation and/or enhancement of parks and gardens of historic and landscape interest and their surroundings. Planning permission for any proposed development will not be granted if it would have a materially adverse impact on their character, features or immediate setting."

AP13 ("Special Landscape Areas")

"The valleys and tributaries of (named rivers) and the Parks and Gardens of Historic or Landscape Interest are designated as Special Landscape Areas and shown on the Proposals Map. The District Council will ensure that no development will take place which would be to the material detriment of, or materially detract from, the special landscape quality."

The appeal site formed part of an area of Historic Parkland (related to an 18th century house known as "Grove Park") identified by the council in its Supplementary Planning Guidance 6 "Historic Parks and Gardens" (SPG) dated December 1995.

34. In his decision-letter on the planning appeal, the inspector identified the main issues as including: consideration of a five years' supply of housing land, the principle of development outside the defined village, and the effects of the proposal on the local historic parkland and landscape (para 4). He referred to paragraphs 14 and 49 of the NPPF, which he approached on the basis that it was "very unlikely that a five years' supply of housing land could now be demonstrated" (paras 5-6). There had been a debate before him whether the recent adoption of the local plan meant that its policies are "automatically up-to-date", but he read the comments of the examining Inspector on the need for an early review of housing delivery as indicating the advantages of "considering development in the light of other up-to date policies", whilst accepting that pending the review "relevant policies for the supply of housing may be considered not to be up-to-date" (para 7).

35. He then considered which policies were "relevant policies for the supply of housing" within the meaning of paragraph 49 (paras 8-9). Policy SP2 "which sets out housing provision for the District" was one such policy and "cannot be considered as up-to-date". Policy SP15 relating to landscape and townscape "and not specifically to the supply of housing" was not a relevant policy "and so is up-to-date". For the same reason, policy SP19, which set the settlement hierarchy and showed percentages of total proposed housing for "broad categories of settlements", but did not suggest figures or percentages for individual settlements, was also seen as up-to-date; as was SP27, which related specifically to Key and Local Service Centres, and sought, among other things, to reinforce their individual character.

36. Of the saved policy AP4 he noted "a degree of conflict" with paragraph 215 of the Framework "due to the absence of a balancing judgement in Policy AP4", but thought its "broad aim" consistent with the aims of the Framework. He said: "these matters reduce the weight that I attach to Policy AP4, although I shall attach some weight to it". Similarly, he thought Policy AP13 consistent with the aims of the Framework to "recognise the intrinsic quality of the countryside and promote policies for the conservation and enhancement of the natural environment" (para 10).

37. In relation to the proposal for development outside the defined village limits, he observed that the appeal site was outside the physical limits boundary "as defined in the very recently adopted Local Plan". He regarded the policy directing development to within the physical limits of the settlement to be "in accordance with

one of the core principles of the Framework, recognising the intrinsic character and beauty of the countryside". On this aspect he concluded:

> "I consider that the appeal site occupies an important position adjacent to the settlement, where Old High Road marks the end of the village and the start to the open countryside. The proposed development would be unacceptable in principle, contrary to the provisions of Policies SP27 and SP29 and contrary to one of the core principles of the Framework." (paras 13-14)

38. As to its location within a historic parkland, he discussed the quality of the landscape and the impact of the proposal, and concluded:

> "20. In relation to the built character and layout of Yoxford and its setting, Old High Road forms a strong and definite boundary to the built development of the village here. I do not agree that the proposal forms an appropriate development site in this respect, but would be seen as an ad-hoc expansion across what would otherwise be seen as the village/countryside boundary and the development site would not be contained to the west by any existing logical boundary.
>
> 21. In respect of these matters, the historic parkland forms a non-designated heritage asset, as defined in the Framework and I conclude that the proposal would have an unacceptable effect on the significance of this asset. In relation to local policies, I find that the proposal would be in conflict with the aims of Policies AP4 and AP13 of the old Local Plan …"

39. Finally, under the heading "The planning balance", he acknowledged the advantage that the proposal would bring "additional homes, including some affordable, within a District where the supply of homes is a concern", but said:

> "However, I have found significant conflict with policies in the recently adopted Local Plan. I have also found conflict with some saved policies of the old Local Plan and I have sought to balance these negative aspects of the proposal against its benefits. In doing so, I consider that the unacceptable effects of the development are not outweighed by any benefits and means that it cannot be considered as a sustainable form of

> development, taking account of its three dimensions as set out at paragraph 7 of the Framework. Therefore, the proposal conflicts with the aims of the Framework." (paras 31-32)

40. Hopkins challenged the decision in the High Court on the grounds that the inspector had misdirected himself in three respects: in short, as to the interpretation of NPPF paragraph 49; as to the status of the limits boundary to Yoxford; and as to the status of Policy AP4. The Secretary of State conceded that the inspector had misapplied the policy in paragraph 49. Supperstone J referred to the approach of Ouseley J in the *Barwood Land* case, with which he agreed, preferring it to that of Lang J in the *William Davis* case. He accepted the submission for Hopkins that the inspector had erred in thinking that paragraph 49 only applied to "policies dealing with the positive provision of housing", with the result that his decision had to be quashed (paras 33, 38-41). He held in addition that this inspector had wrongly proceeded on the basis that the village boundary had been defined in the recent local plan, rather than in the earlier plan (para 46); and that he had failed properly to assess the significance of the heritage asset as required by paragraph 135 of the Framework (para 53). On 30 January 2015 Supperstone J quashed the decision. The council's appeal to the Court of Appeal failed. It now appeals to this court.

The Willaston site

41. The Crewe and Nantwich Replacement Local Plan, adopted on 17 February 2005 ("the adopted RLP") sought to address the development needs of the Crewe and Nantwich area for the period from 1996 to 2011. Under the 2004 Act, it should have been replaced by a Local Development Framework by 2008. This did not happen. As a consequence, the policies were saved by the Secretary of State by Direction (dated 14 February 2008).

42. Crewe is identified as a location for new housing growth in the emerging Local Plan, which is the subject of an ongoing examination in public and subject to objections, as are some of the proposed housing allocations. At the time of the public inquiry in June 2014, the emerging Local Plan was understood to be over two years from being adopted. Richborough Estates Partnership LLP ("Richborough") in August 2013 applied to Cheshire East Borough Council for permission for a development of up to 170 houses on land north of Moorfields in Willaston. The council having failed to determine the application within the prescribed period, Richborough appealed. Willaston is a settlement within the defined urban area of Crewe, but for the most part is physically separate from the town. As a consequence there is open land between Willaston and the main built up area of Crewe, within which open land the appeal site lies.

43. In the appeal Cheshire East relied on the adopted RLP, in particular policies NE.2, NE.4, and RES.5:

> i) Policy NE.2 ("Open Countryside") seeks to protect the open countryside from new build development for its own sake, permitting only a very limited amount of small scale development mainly for agricultural, forestry or recreational purposes.
>
> ii) Policy NE.4 ("Green Gap") relates to areas of open land around Crewe (including the area of the appeal site) identified as needing additional protection "in order to maintain the definition and separation of existing communities". The policy provides that permission will not be granted for new development, including housing, save for limited exceptions. It has the same inner boundary as NE.2.
>
> iii) Policy RES.5 ("Housing in the open countryside") permits only very limited forms of residential development in the open countryside, such as agricultural workers' dwellings.

44. In his decision letter dated 1 August 2014 the inspector allowed the appeal and granted planning permission for up to 146 dwellings. He concluded that Cheshire East was unable to demonstrate the minimum five year supply of housing land required under paragraph 47 of the NPFF. The council appears to have accepted at the inquiry that policy NE.2 was a policy "for the supply of housing". The inspector thought that the same considerations applied to the other two policies relied on by the council, all of which were therefore relevant policies within paragraph 49, although he acknowledged that policy NE.4 also performed strategic functions in maintaining the separation and definition of settlements and in landscape protection. He noted also that two of the housing sites in the emerging local plan were in designated "green gaps", which led him to give policy NE.4 reduced weight (paras 31-35).

45. He concluded on this aspect (para 94):

> "94. I have concluded that there is not a demonstrable five-year supply of deliverable housing sites (issue (i)). In the light of that, the weight of policies in the extant RLP relevant to the supply of housing is reduced (issue (ii)). That applies in particular to policies NE.2, NE.4 and RES.5 in so far as their extent derives from settlement boundaries that in turn reflect

> out-of-date housing requirements, though policy NE.4 also has a wider purpose in maintaining gaps between settlements."

46. He considered the application of the Green Gap policy, concluding that there would be "no significant harm to the wider functions of the gap in maintaining the definition and separation of these two settlements" (para 95). His overall conclusion was as follows:

> "101. I conclude that the proposed development would be sustainable overall, and that the adverse effects of it would not significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework as a whole. There are no specific policies in the NPPF that indicate that this development should be restricted. In such circumstances, and where relevant development plan policies are out-of-date, the NPPF indicates that permission should be granted unless material considerations indicate otherwise. There are no further material considerations that do so."

47. The council's challenge succeeded before Lang J, who quashed the inspector's decision by an order dated 25 February 2015. In short, she concluded that the inspector had erred in treating policy NE.4 as a relevant policy under paragraph 49, and in seeking "to divide the policy, so as to apply it in part only" (para 63). Richborough's appeal was allowed by the Court of Appeal with the result that the permission was restored. The council appeals to this court.

The Court of Appeal's interpretation

48. Giving the judgment of the court, Lindblom LJ referred to the relevant parts of the NPPF and (at para 21) the three competing interpretations of paragraph 49:

> i) *Narrow*: limited to policies dealing only with the numbers and distribution of new housing, and excluding any other policies of the development plan dealing generally with the disposition or restriction of new development in the authority's area.
>
> ii) *Wider*: including both policies providing positively for the supply of new housing and other policies, or "counterpart" policies, whose effect is to restrain the supply by restricting housing development in certain parts of the authority's area.

iii) *Intermediate*: as under (ii), but excluding policies designed to protect specific areas or features, such as gaps between settlements, the particular character of villages or a specific landscape designation (as suggested by Ouseley J in the *Barwood Land* case).

49. He discussed the connection between paragraph 49 and the presumption in favour of sustainable development in paragraph 14, which lay in the concept of relevant policies being not "up-to-date" under paragraph 49, and therefore "out-of-date" for the purposes of paragraph 14 (para 30). He explained the court's reasons for preferring the wider view of paragraph 49. He read the words "for the supply of housing" as meaning "affecting the supply of housing", which he regarded as not only the "literal interpretation" of the policy, but "the only interpretation consistent with the obvious purpose of the policy when read in its context". He continued:

> "33. Our interpretation of the policy does not confine the concept of 'policies for the supply of housing' merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognizes that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed - including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another by preventing or limiting development. It reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it - that policies of both kinds make the supply what it is." (para 33)

50. The court rejected the "narrow" interpretation, advocated by the councils, which it thought "plainly wrong":

> "It is both unrealistic and inconsistent with the context in which the policy takes its place. It ignores the fact that in every development plan there will be policies that complement or support each other. Some will promote development of one type or another in a particular location, or by allocating sites for particular land uses, including the development of housing. Others will reinforce the policies of promotion or the site allocations by restricting development in parts of the plan area,

> either in a general way - for example, by preventing development in the countryside or outside defined settlement boundaries - or with a more specific planning purpose - such as protecting the character of the landscape or maintaining the separation between settlements." (para 34)

51. Whether a particular policy of a plan was a relevant policy in that sense was a matter for the decision-maker, not the court (para 45). Furthermore

> "46. We must emphasize here that the policies in paragraphs 14 and 49 of the NPPF do not make 'out-of-date' policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker … Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is 'out-of-date' should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied …"

52. In relation to the Yoxford site, the court agreed with Supperstone J that the inspector had wrongly applied the erroneous "narrow" interpretation. Policies SP 19, 27 and 29, were all relevant policies in that they all "affect the supply of housing land in a real way by restraining it" (paras 51-52). The court also agreed with the judge that the inspector had been mistaken in assuming that the physical limits of the village had been established in the 2013 plan (para 58); and also that he had misapplied paragraph 135 relating to heritage assets (para 65). In that respect there could be no criticism of his treatment of the impact of the development on the local landscape, but what was lacking was

> "… a distinct and clearly reasoned assessment of the effect the development would have upon the significance of the parkland as a 'heritage asset', and, crucially, the 'balanced judgment' called for by paragraph 135, 'having regard to the scale of any harm or loss and the significance of the heritage asset'." (para 65)

53. In respect of the Willaston site, the court disagreed with Lang J's conclusion that policy NE.4 was not a relevant policy for the supply of housing. The inspector had made no error of law in that respect, and his decision should be restored (paras 69-71).

Discussion

Interpretation of paragraph 14

54. The argument, here and below, has concentrated on the meaning of paragraph 49, rather than paragraph 14 and the interaction between the two. However, since the primary purpose of paragraph 49 is simply to act as a trigger to the operation of the "tilted balance" under paragraph 14, it is important to understand how that is intended to work in practice. The general effect is reasonably clear. In the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission, except where the benefits are "significantly and demonstrably" outweighed by the adverse effects, or where "specific policies" indicate otherwise. (See also the helpful discussion by Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), paras 42ff)

55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgement, unrelated of course to paragraph 49 which deals only with housing supply. This may in turn have an effect on other related policies, for example for transport. The pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgement, not dependent on issues of legal interpretation.

56. If that is the right reading of paragraph 14 in general, it should also apply to housing policies deemed "out-of-date" under paragraph 49, which must accordingly be read in that light. It also shows why it is not necessary to label other policies as "out-of-date" merely in order to determine the weight to be given to them under paragraph 14. As the Court of Appeal recognised, that will remain a matter of planning judgement for the decision-maker. Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the "tilted balance".

Paragraph 49

57. Unaided by the legal arguments, I would have regarded the meaning of paragraph 49 itself, taken in context, as reasonably clear, and not susceptible to much legal analysis. It comes within a group of paragraphs dealing with delivery of housing. The context is given by paragraph 47 which sets the objective of boosting the supply of housing. In that context the words "policies for the supply of housing" appear to do no more than indicate the category of policies with which we are concerned, in other words "housing supply policies". The word "for" simply indicates the purpose of the policies in question, so distinguishing them from other familiar categories, such as policies for the supply of employment land, or for the protection of the countryside. I do not see any justification for substituting the word "affecting", which has a different emphasis. It is true that other groups of policies, positive or restrictive, may interact with the housing policies, and so *affect* their operation. But that does not make them policies *for* the supply of housing in the ordinary sense of that expression.

58. In so far as the paragraph 47 objectives are not met by the housing supply policies as they stand, it is quite natural to describe those policies as "out-of-date" to that extent. As already discussed, other categories of policies, for example those for employment land or transport, may also be found to be out-of-date for other reasons, so as to trigger the paragraph 14 presumption. The only difference is that in those cases there is no equivalent test to that of the five-year supply for housing. In neither case is there any reason to treat the shortfall in the particular policies as rendering out-of-date other parts of the plan which serve a different purpose.

59. This may be regarded as adopting the "narrow" meaning, contrary to the conclusion of the Court of Appeal. However, this should not be seen as leading, as the lower courts seem to have thought, to the need for a legalistic exercise to decide whether individual policies do or do not come within the expression. The important question is not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47. If there is a failure in that respect, it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies. The shortfall is enough to trigger the operation of the second part of paragraph 14. As the Court of Appeal recognised, it is that paragraph, not paragraph 49, which provides the substantive advice by reference to which the development plan policies and other material considerations relevant to the application are expected to be assessed.

60. The Court of Appeal was therefore right to look for an approach which shifted the emphasis to the exercise of planning judgement under paragraph 14. However, it was wrong, with respect, to think that to do so it was necessary to adopt a reading

of paragraph 49 which not only changes its language, but in doing so creates a form of non-statutory fiction. On that reading, a non-housing policy which may objectively be entirely up-to-date, in the sense of being recently adopted and in itself consistent with the Framework, may have to be treated as notionally "out-of-date" solely for the purpose of the operation of paragraph 14.

61. There is nothing in the statute which enables the Secretary of State to create such a fiction, nor to distort what would otherwise be the ordinary consideration of the policies in the statutory development plan; nor is there anything in the NPPF which suggests an intention to do so. Such an approach seems particularly inappropriate as applied to fundamental policies like those in relation to the Green Belt or Areas of Outstanding Natural Beauty. No-one would naturally describe a recently approved Green Belt policy in a local plan as "out of date", merely because the housing policies in another part of the plan fail to meet the NPPF objectives. Nor does it serve any purpose to do so, given that it is to be brought back into paragraph 14 as a specific policy under footnote 9. It is not "out of date", but the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles.

The two appeals

62. Against this background I can deal relatively shortly with the two individual appeals. On both I arrive ultimately at the same conclusion as the Court of Appeal.

63. It is convenient to begin with the Willaston appeal, where the issues are relatively straightforward. On any view, quite apart from paragraph 49, the current statutory development plan was out of date, in that its period extended only to 2011. On my understanding of paragraph 49, the council and the inspector both erred in treating policy NE.2 ("Countryside") as "a policy for the supply of housing". But that did not detract materially from the force of his reasoning (see the summary in paras 44-45 above). He was clearly entitled to conclude that the weight to be given to the restrictive policies was reduced to the extent that they derived from "settlement boundaries that in turn reflect out-of-date housing requirements" (para 94). He recognised that policy NE.4 had a more specific purpose in maintaining the gap between settlements, but he considered that the proposal would not cause significant harm in this context (para 95). His final conclusion (para 101) reflected the language of paragraph 14 (the tilted balance). There is no reason to question the validity of the permission.

64. The Yoxford appeal provides an interesting contrast, in that there was an up-to-date development plan, adopted in the previous year; but its housing supply

policies failed to meet the objectives set by paragraph 47 of the NPPF. The inspector rightly recognised that they should be regarded as "out-of-date" for the purposes of paragraph 14. At the same time, it provides a useful illustration of the unreality of attempting to distinguish between policies for the supply of housing and policies for other purposes. Had it mattered, I would have been inclined to place in the housing category policy SP2, the principal policy for housing allocations. SP 19 (settlement policy) would be more difficult to place, since, though not specifically related to housing, it was seen (as the commentary indicated) as a "planning tool" designed to differentiate between developed areas and the countryside.

65. Understandably, in the light of the judicial guidance then available to him, the inspector thought it necessary to make the distinction, and to reflect it in the planning balance. He categorised both SP 19 and SP 27 as non-housing policies, and for that reason to be regarded as "up-to-date" (see para 35 above). Under the Court of Appeal's interpretation this was an erroneous approach, because each of these policies "affected" the supply of housing, and should have been considered out-of-date for that reason. On my preferred approach his categorisation was not so much erroneous in itself, as inappropriate and unnecessary. It only gave rise to an error in law in so far as it may have distorted his approach to the application of paragraph 14.

66. As to that I agree with the courts below that his approach (through no fault of his own) was open to criticism. Having found that the settlement policy was up-to-date, and that the boundary had been approved in the recent plan, he seems to have attached particular weight to the fact that it had been defined in "the very recently adopted Local Plan" (para 37 above). I would not criticise him for failing to record that it had been carried forward from the previous plan. In some circumstances that could be a sign of robustness in the policy. But in this case it was clear from the plan itself that the settlement boundary was, to an extent at least, no more than the counterpart of the housing policies, and that, under the paragraph 14 balance, its weight might need to be reduced if the housing objectives were to be fulfilled. He should not have allowed its supposed status as an "up-to-date" policy under paragraph 49 to give it added weight. It is true that he also considered the merits of the site (quite apart from the plan) as providing a "strong and definite boundary" to the village (para 20). But I am not persuaded that this is sufficient to make it clear that the decision would have been the same in any event.

67. I do not, however, agree with the Court of Appeal's criticisms of his treatment of the Heritage Asset policy. Paragraph 10 of his letter (summarised at para 36 above) is in my view a faithful application of the guidance in paragraph 215 of the Framework. That does not, and could not, suggest that even "saved" development plan policies are simply replaced by the policies in the Framework. What it does is to indicate that the weight to be given to the saved policies should be assessed by reference to their degree of consistency with the Framework. That is what the

inspector did. Having done so he was entitled to be guided by the policies as stated in the saved plans, and not treat them as replaced by paragraph 135.

68. In any event, in so far as there needs to be a "balanced judgement", which the Court of Appeal regarded as "crucial" (para 65), that seems to me provided by the last section of his letter, headed appropriately "the planning balance". Overall the letter seems to me an admirably clear and carefully constructed appraisal of the relevant planning issues, in the light of the judicial guidance then available. It is with some reluctance therefore that I feel bound to agree with the Court of Appeal that the decision must be quashed, albeit on narrower grounds. The result, is that the order of Supperstone J will be affirmed, and the planning appeal will fall to be re-determined.

Conclusion

69. For these reasons I would dismiss both appeals.

LORD GILL: (with whom Lord Neuberger, Lord Clarke and Lord Hodge agree)

70. I agree with Lord Carnwath's conclusions on the decision that is appealed against and with his views as to the disposal of these appeals. I only add some comments on the approach that should be taken in the application of the National Planning Policy Framework (the Framework) in planning applications for housing development.

71. These appeals raise a question as to the respective roles of the courts and of the planning authorities and the inspectors in relation to guidance of this kind; and a specific question of interpretation arising from paragraph 49 of the Framework.

72. In *Tesco Stores Ltd v Dundee City Council, (ASDA Stores Ltd intervening)* ([2012] UKSC 13) Lord Reed considered the former question in relation to development plan policies. He expressed the view, as a general principle of administrative law, that policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context (at para 18). The proper context, in my view, is provided by the over-riding objectives of the development plan and the specific objectives to which the policy statement in question is directed. Taking a similar approach to that of Lord Reed, I consider that it is the proper role of the courts to interpret a policy where the meaning of it is contested, while that of the planning authority is to apply the policy to the facts of the individual case.

73. In my opinion, the same distinction falls to be made in relation to guidance documents such as the Framework. In both cases the issue of interpretation is the same. It is about the meaning of words. That is a question for the courts. The application of the guidance, as so interpreted, to the individual case is exclusively a planning judgment for the planning authority and the inspectors.

74. The guidance given by the Framework is not to be interpreted as if it were a statute. Its purpose is to express general principles on which decision-makers are to proceed in pursuit of sustainable development (paras 6-10) and to apply those principles by more specific prescriptions such as those that are in issue in these appeals.

75. In my view, such prescriptions must always be interpreted in the overall context of the guidance document. That context involves the broad purpose of the guidance and the particular planning problems to which it is directed. Where the guidance relates to decision-making in planning applications, it must be interpreted in all cases in the context of section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004, to which the guidance is subordinate. While the Secretary of State must observe these statutory requirements, he may reasonably and appropriately give guidance to decision-makers who have to apply them where the planning system is failing to satisfy an unmet need. He may do so by highlighting material considerations to which greater or less weight may be given with the over-riding objective of the guidance in mind. It is common ground that such guidance constitutes a material consideration (Framework, para 2).

76. In relation to housing, the objective of the Framework is clear. Section 6, "Delivering a wide choice of high quality homes", deals with the national problem of the unmet demand for housing. The purpose of paragraph 47 is "to boost significantly the supply of housing". To that end it requires planning authorities (a) to ensure *inter alia* that plans meet the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in the Framework, including the identification of key sites that are critical to the delivery of the housing strategy over the plan period; (b) to identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements, with an additional buffer of 5% to ensure choice and competition in the market for the land; and (c) in the longer term to identify a supply of specific, developable sites or broad locations for growth for years six to ten and, where possible, for years 11-15.

77. The importance that the guidance places on boosting the supply of housing is further demonstrated in the same paragraph by the requirements that for market and affordable housing planning authorities should illustrate the expected rate of housing

delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing, describing how they will maintain delivery of a five-years supply of housing land to meet their housing target; and that they should set out their own approach to housing density to reflect local circumstances. The message to planning authorities is unmistakeable.

78. These requirements, and the insistence on the provision of "deliverable" sites sufficient to provide the five years' worth of housing, reflect the futility of authorities' relying in development plans on the allocation of sites that have no realistic prospect of being developed within the five-year period.

79. Among the obvious constraints on housing development are development plan policies for the preservation of the greenbelt, and environmental and amenity policies and designations such as those referred to in footnote 9 of paragraph 14. The rigid enforcement of such policies may prevent a planning authority from meeting its requirement to provide a five-years supply.

80. This is the background to the interpretation of paragraph 49. The paragraph applies where the planning authority has failed to demonstrate a five-years supply of deliverable sites and is therefore failing properly to contribute to the national housing requirement. In my view, paragraph 49 derives its content from paragraph 47 and must be applied in decision-making by reference to the general prescriptions of paragraph 14.

81. To some extent the issue in these cases has been obscured by the doctrinal controversy which has preoccupied the courts hitherto between the narrow and the wider interpretation of the words "relevant policies for the supply of housing". I think that the controversy results from too narrow a focus on the wording of that paragraph. I agree with the view taken by Lindblom LJ in his lucid judgement that the task of the court is not to try to reconcile the various first instance judgments on the point, but to interpret the policy of paragraph 49 correctly (at para 23). In interpreting that paragraph, in my opinion, the court must read it in the policy context to which I have referred, having in view the planning objective that the Framework seeks to achieve.

82. I regret to say that I do not agree with the interpretation of the words "relevant policies for the supply of housing" that Lindblom LJ has favoured. In my view, the straightforward interpretation is that these words refer to the policies by which acceptable housing sites are to be identified and the five-years supply target is to be achieved. That is the narrow view. The real issue is what follows from that.

83. If a planning authority that was in default of the requirement of a five-years supply were to continue to apply its environmental and amenity policies with full rigour, the objective of the Framework could be frustrated. The purpose of paragraph 49 is to indicate a way in which the lack of a five-years supply of sites can be put right. It is reasonable for the guidance to suggest that in such cases the development plan policies for the supply of housing, however recent they may be, should not be considered as being up to date.

84. If the policies for the supply of housing are not to be considered as being up to date, they retain their statutory force, but the focus shifts to other material considerations. That is the point at which the wider view of the development plan policies has to be taken.

85. Paragraph 49 merely prescribes how the relevant policies for the supply of housing are to be treated where the planning authority has failed to deliver the supply. The decision-maker must next turn to the general provisions in the second branch of paragraph 14. That takes as the starting point the presumption in favour of sustainable development, that being the "golden thread" that runs through the Framework in respect of both the drafting of plans and the making of decisions on individual applications. The decision-maker should therefore be disposed to grant the application unless the presumption can be displaced. It can be displaced on only two grounds both of which involve a planning judgment that is critically dependent on the facts. The first is that the adverse impacts of a grant of permission, such as encroachment on the greenbelt, will "significantly and demonstrably" outweigh the benefits of the proposal. Whether the adverse impacts of a grant of permission will have that effect is a matter to be "assessed against the policies in the Framework, taken as a whole". That clearly implies that the assessment is not confined to environmental or amenity considerations. The second ground is that specific policies in the Framework, such as those described in footnote 9 to the paragraph, indicate that development should be restricted. From the terms of footnote 9 it is reasonably clear that the reference to "specific policies in the Framework" cannot mean only policies originating in the Framework itself. It must also mean the development plan policies to which the Framework refers. Green belt policies are an obvious example.

86. Although my interpretation of the guidance differs from that of the Court of Appeal, I have come to the same conclusions in relation to the disposal of these cases. I agree with Lord Carnwath that in the Willaston decision, notwithstanding an erroneous interpretation of policy NE.2 as being a policy for the supply of housing, the Inspector got the substance of the matter right and accurately applied paragraph 14. I agree too with Lord Carnwath, for the reasons that he gives (at para 68), that in the Yoxford decision the Inspector made a material, but understandable, error. I would therefore dismiss both appeals.